(1)

Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

October Term, 1996

Louis M. Waller,

Petitioner,

v.

Kentucky Bar Association

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Kentucky

PETITION FOR WRIT OF CERTIORARI

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91 pp

Section A

QUESTIONS PRESENTED FOR REVIEW

(1) Were constitutional guarantees available to attorney suspended from practice of law for persisting in belief that remarks made about former Judge/Justice were accurately descriptive?

(2) Where that former Judge/Justice was characterized in preface to legal memorandum filed in Court in the following terms:

> "Comes defendant, by counsel, and respectfully moves the Honorable Court, much better than that lying, incompetent ass hole it replaced if you graduated from the eighth grade, and suggests as a jumping-off point for discussion of the law ..."

was that characterization per se punishable where the former Judge/Justice so described had recused when the remarks were made and was not involved in the case in which filed in any way; there was no disruption of the tribunal; no clear and present danger to the administration of justice; the only evidence presented was transcript and other evidence presented by petitioner attorney; where there was no law or rule prohibiting such speech; where no person testified or asserted that the words were not accurately descriptive and the only law or rule found to have been violated was rule against uttering statements known to be false or with reckless disregard for truth about Judge?

(3) Where attorney, having been previously punished by fine and imprisonment for contempt in making the characterization requested hearing to prove truth of characterizations was denial of hearing on grounds that only issue of law was presented denial of due process?

(4) Could Bar Association after finding attorney not guilty of all original charges use Court of Appeals decision affirming contempt Judgment as basis of amending charges sua sponte over a year after making original charges where Supreme Court had denied discretionary review of that Court of Appeals decision?

(5) Was attorney denied due process where State Supreme Court Justice was identified early in both contempt and disciplinary proceedings as cause of Judge/Justice deeming himself immune from responsibility for his judicial actions, did not recuse and wrote opinion denying attorney discretionary review of contempt case, wrote opinion suspending attorney over recommendation of Bar Association and refused to recuse when specifically asked to do so upon attorney's motion to reconsider?

(6) Where that Supreme Court Justice recommended former Judge/Justice to fill unexpired term vacancy on Supreme Court shortly after the criminal contempt and disciplinary proceedings and attorney moved to dismiss charges because he could not have a fair trial in Kentucky was refusal to rule on that motion denial of due process?

(7) Could Kentucky Supreme Court, after having denied attorney's motion for discretionary review of criminal contempt Judgment, use language used in contempt proceedings pleadings by attorney as a basis for suspending attorney from practice of law and, if so, did use of that language represent re-trial of attorney on contempt charge and enhancement of penalty without hearing?

Section B
THE PARTIES

Parties to this proceeding are Louis M. Waller, an attorney suspended from practice in Logan County, Kentucky who petitions pro se and the Kentucky Bar Association which is an administrative arm of the Kentucky Supreme Court in practice and with respect to which that court is authorized by Chapter 21A.160 of the Kentucky Revised Statutes to adopt rules and regulations for it and its members.

The Chief Justice of that Court is Robert Stephens, who is frequently referred to herein and whose practices are deemed by petitioner to obstruct justice in Kentucky. Section 110 of the Kentucky Constitution makes that Chief Justice responsible for administrative functions relating to the Court.

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF ANY OPINIONS DELIVERED IN THE COURTS OR ADMINISTRATIVE AGENCY BELOW

(See Exhibit "A")

(1) Kentucky Bar Association Vs. Louis M. Waller
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(2) Louis M. Waller vs. Honorable William R. Harris, Special Judge, Logan County Circuit Court - Opinion (Affirming not to be Published order during review.)

Section E

CONCISE STATEMENT OF GROUNDS FOR JURISDICTION

(I) Date of Judgment or Decree sought to be Reviewed, and the time of its entry: Opinion and Order of Supreme Court of Kentucky Entered August 29, 1996 (the Order denying Motion to Reconsider was entered September 26, 1996);

(ii) Date of any Order for Rehearing: September 26, 1996 Motion Denied;

(iii) The Statutory Provision Believed to confer on the Court Jurisdiction to Review the Judgment by Writ of Certiorari: 28 USCS Sec. 1257(3);

(iv) The constitutional provisions and Regulations which the Case Involves, setting them Out Verbatim and Giving the Appropriate Citation therefor: See Jurisdictional Statement for Constitutional provisions as set forth in Baldwin's Kentucky Revised Statutes, Vol. 1, Constitutions and Supreme Court Rule 3.130-8.2 (a) from Baldwin's Kentucky Revised Statutes, Volume 9 is copied verbatim in Appendix.

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JURISDICTIONAL STATEMENT

(i) Petitioner seeks review of Opinion and Order of the Supreme Court of Kentucky entered August 29, 1996. The Supreme Court of Kentucky denied petitioner's Motion to Reconsider by Order entered September 26, 1996.
(ii) The United States Supreme Court is empowered to review the Opinion and Order of the Supreme Court of Kentucky by Chapter 28 USCS 1257 (3) and the following constitutional amendments to the Constitution of the United States of America:

Amendment 1 "Congress shall make no law ... abridging the freedom of speech.."

Amendment 14 (1) "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

Amendment 13 "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to its jurisdiction."

Amendment 8 "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"

(iii) The following provisions of the Constitution of the Commonwealth of Kentucky the protection of which has been denied, also apply:

Section 1 - (Civil Rights Guaranteed) - "Fourth: The right of freely communicating their thoughts and opinions." "Fifth: The right of acquiring and protecting property"

Section 2 - "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

Section 3 - "All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any men or set of men, except in consideration of public services:"

Section 4 - "All power is inherent in the people ... they have at all times an inalienable and indefensible right to alter, reform or abolish their government in such manner as they may deem proper."

Section 8 - "Every person may freely and fully speak, being responsible for the abuse of that liberty."

Section 9 - "Truth may be given in evidence in prosecution for publishing matters proper for public information; in prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libel the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases"

Section 13 - "...nor shall any man's property be taken or applied for public use without the consent of his representative, and without just compensation being previously made to him"

Section 14 - "All courts shall be open and every person, for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

Section F

FACTS

The Supreme Court of Kentucky, having received recommendations of the Kentucky Bar Association recommending reprimand, elected to exercise its right under Rules governing the practice of law to review on its own motion, no motion having been made for review, the decision of the Kentucky Bar Association Board of Governors. The notice or review read, "All concur, except Stephens, C. J., Not Sitting." (see Appendix "B")

It was determined that although the Board of Governors had recommended only reprimand since the attorney was "utterly unrepentant and apparently intent on convincing this Court of the truth of his assertions", the Court must impose "a punishment of sufficient severity, to forcefully inform Respondent that he is wrong." Appropriate punishment was found to be suspension from the practice of law for a period of six (6) months, an order to pay costs of the proceedings and to notify clients within ten days of entry of the Order of his inability to represent them, and of the necessity of retaining new counsel. The Order was entered August 29, 1996, "to be published."

Petitioner ceased practice of law and sent the required letters. He moved the Court immediately to suspend the Order while his Motion to Reconsider was being considered or failing same, his petition for certiorari to this Court was ruled upon. He asked disqualification of Justice Stevens who had written the opinion (disqualified on grounds that he was not only a close personal friend of the former Judge/Justice about whom the remarks were made, but that friendship was the reason given in earlier pleadings why that Judge/Justice thought that he was above the law). Approximately a month later the same Chief Justice Stevens signed the Order denying the motion to stay except up to the date of that Order and denied the motion to reconsider.

The Court in its August 29, 1996 opinion stated that,

"there never can be justification for a lawyer to use such scurrilous language with respect to a judge in pleadings or in open court."

Petitioner argues that there can be such justification and lists the following reasons:

(1) The former Judge/Justice was not involved in the case in any way when the remarks were made.

(2) The remarks were intentionally structured to distinguish between the Court, to whom they were addressed, and the former Judge/Justice about whom they were written.

(3) Petitioner had represented the bank of which the former Judge/Justice was director and had been the appointee to numerous special commissioner appointments made by that judge, which representation and appointment ceased after the Judge/Justice intervened in matters before his Court involving the bank and petitioner became familiar with the practices of that Judge/Justice and knew them to be wrong.

(4) Petitioner knew and asserted knowledge that the former Judge/Justice operated outside the law and to believe that he was immune from accountability due to a close personal friendship of many years with Robert Stephens, Chief Justice of the Supreme Court of Kentucky.

(5) The remarks were made only after petitioner had reviewed the transcript of a hearing in which it was sought to have recently installed fencing strung along the line of an old boundary fence taken down, that fencing allegedly denying persons, including a corporation, which was comprised of the business partners of the former Judge/Justice, road access, the hearing transcript showing:

(a) That the former Judge/Justice had issued an ex-parte restraining order without required certification on notice and

had been asked at the outset to recuse on grounds that he was a business partner of one of the parties. He had refused to do so, using the hearing as a device to search out weaknesses in the case of petitioner's client and to attempt to cause her to desist in defense of her property.

(b) That the former Judge/Justice had permitted Logan County, Kentucky to participate in the hearing even though it was not then a party, he controlling that County Government.

(c) That the former Judge/Justice during the hearing identified petitioner's legal advice as the cause of his client's problems and stated that petitioner had "sat there" and let the client testify during cross-examination that she had let others use the roadway.

(d) That the former Judge/Justice purported at the hearing to be unfamiliar with the road and the land along the roadway knowing that he had himself appointed guardian for orphans for the purpose of exercising control over their land bordering the road and had exercised control over it for over 10 years until the youngest child reached the age of majority, at which time it was conveyed to his business partners. He also knew that the matter of the dispute over the road had been pending in Fiscal Court for years due to wide publicity reported in the local newspaper (which he owned). The tax card for property on the West side of the road showed the property assessment was "given in by Billy Fuqua" (the former Judge/Justice)

(e) That the roadway was intended to be an access way for a planned state highway by-pass, which access way would pass through or near subdivisions of which the Judge/Justice was owner and that the former Judge/Justice was the primary interface between Logan County, Kentucky and state government in Frankfort, having made numerous trips and attended many meetings as representative of a County Industrial Development Commission.

(f) After the owner on the west had closed a parallel road running through that property same Logan County government had placed a road sign at the end of the disputed roadway identifying it as a county road knowing that it was not a county road and (the judgment in the road dispute case was ultimately made that it was not a county road). Petitioner's client had been twice arrested and imprisoned for exercising dominion over the road which she contended had been in her family for many years, a conclusion with which the appraiser for the Highway Department agreed.

(g) That the former Judge/Justice threatened petitioner's client with further imprisonment during the hearing based upon laws having to do with "spite fences."

(h) That the former Judge/Justice urged petitioner's client in forceful terms at the hearing not to follow petitioner's advice and when she persisted threatened her with loss of her home.

(i) That the former Judge/Justice pleaded with members of a black church delegation in attendance at the hearing to not let petitioner's client make the mistake of maintaining her position and pleaded with them to either listen to him or listen to petitioner. When rebuffed he referred to black minister as a "Tom" such that his having done so was used by that minister in a later sermon as an example of racial bigotry.

(j) That the said former Judge/Justice (referring as the other "we" to counsel for his business partner who participated in the hearing) told petitioner at the hearing "We're doing it to you man - we're doing it to you."

(k) That the roadway was near the Logan County Airport and offered proximity to proposed rock quarry of the business partners. The air board authority was controlled by the former Judge/Justice who solicited bids for runway extension

using title Circuit Judge, then made arrangements to have the contract awarded on a non-competitive basis to his business partners, public development funds being used to pay for that contract.

(l) Former Judge/Justice was also close personal friend of airport manager, whom he soloed under and whom he married in his home, and worked physically on airport runway expansion. That airport manager later crashed in a Florida swamp while transporting bales of Colombian marijuana.

Section G

STATEMENT OF THE STAGE AT WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED, ITS MANNER OR METHOD OF RAISING AND THE WAY THAT THEY WERE PASSED UPON BY THE COURT

The Complaint to the Bar Association was initiated by the Special Judge June 27, 1994, the "Sua Sponte Show Cause Order" in the contempt case was entered June 24, 1994.

On June 27, 1994 in his memorandum titled "Memorandum in Defense of the Use of the Term {As Hole} to Draw the attention of the Public to Corruption in Judicial Use"(see Appendix "D") in the Contempt case petitioner stated:

> "The undersigned would first assure this Court that it is not dealing with a madman set upon destruction of the courts of this Commonwealth and that he will never again (he has never in the past) use the demeaning appellation "ass hole" to refer to this or any other Court, this being a one time use to test the issue in the Supreme Court of the United States"

The Kentucky Bar Association (which found the original three charges unfounded) requested or was persuaded to request that the charges be amended to include violation of SCR 3.130-8.2 (the knowing untrue or with reckless disregard for truth charge) July 25, 1995. On July 26, 1995 (see Appendix "D"), petitioner mailed his "Motion to Reconsider" stated that respondent was prepared to present evidence in support of his characterization, argued that the only basis for amending was the opinion of the Court of Appeals in the Contempt Case and stated:

> "The Court of Appeals decision in 95-CA-001845 (95-SC-000586 on Motion for Discretionary Review) is contrary to the "clear and present danger" standard adopted by the Supreme Court of the United States. Wood v. Georgia, 370 U.S. 375, 82 5. Ct. 1364, 8 L.Ed.2d 569 (1962), Bridges V. California, 314 U.S. 252, 273, 62 5. Ct. 190, 198, 86 L. Ed. 192 (1941)".

These Supreme Court cases were argued in oral argument before the Court of Appeals (video tape exists) in the Contempt case. They were argued in petitioner's June 23, 1995 Motion for Discretionary Review (see Appendix "B") in that case. Under reason why the judgment should be reviewed petitioner stated:

> The law as enunciated by the trial court and the Court of Appeals is contrary to the law of the Supreme Court of the United States and that of all other jurisdictions which have addressed the questions of law involved.
>
> "Whether statements are made in the presence of the court or outside of that presence they are protected by the guarantee of freedom of speech of the First Amendment to the constitutions of this Commonwealth and of the United States of America and by the Fourteenth Amendment to the Constitution of the United States. Contemptuous statements are not so protected. The test applied to

determine whether a statement is contemptuous is whether there is a clear and present danger to the administration of justice. Wood V. Georgia, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed.2d 569 (1962). Neither "inherent tendency nor reasonable tendency" is enough to justify a restriction on free expression. Bridges V. California, 314 U.S. 252, 273, 62 5. Ct. 190, 198, 86 L. Ed.2d 192 (1941). These questions are discussed by the Supreme Court of Georgia in Garland V. State, 325 S.E.2d 131 (Ga. 1985) in appendix hereto and Garland , in turn, is cited in 17 AmJur2d Sec. 84 (contempt) 1990). The answers to the questions of law is that no, words alone not enough to sustain criminal contempt. There must be a showing of their effect. The words, odious, unseemly and intemperate as they may appear, are protected free speech."

The Garland Case had applied the Wood and Bridges holding to Attorney Statements under similar circumstances.

Petitioner never believed that the Supreme Court of Kentucky would follow the law stated by the Supreme Court of the United States in this case. His July 28, 1995 motion to dismiss in the matter of the Bar Association Charge concluded with the words:

"... the cause is rightful and not personal and is directly connected to proper representation of clients who truly are being deprived of their rights granted by the constitutions and law. Now if I can just persuade the United States Supreme Court to grant certiorari after you guys have done your number on me?"

Section H

A DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASON RELIED UPON FOR ALLOWING THE WRIT

The Opinion and Order appealed from states that petitioner's view that first amendment protection is available is without merit (Opinion p. 5) and cites In Re Sawyer, 360 U.S. 622, 79 S. Ct. 1376, 3 L. Ed. 2d 1473 (1959); Kentucky Bar Association v. Heleringer, Ky., 602 S.W.2d 165, 167-68 (1980). Heleringer did not involve remarks made about a judge not in the case in a legal memorandum.

In Heleringer (which involved remarks made at a press conference about a sitting judge who had issued a CR 65.03 restraining order before the 1986 amendment to the Rule requiring certification of efforts made to give notice) the distinction between the knowledge of the lay public and those informed in the law was stressed, lay persons not knowing that an ex parte order was proper. In the case at bar the remarks were made about a judge no longer involved in the case in any way, were structured to differentiate the Court and that judge and, unlike Sawyer were accurately descriptive and the proof was available to be shown. The judge and lawyers reading the remarks were capable of recognizing that the former Judge/Justice about whom the comments were made had clearly acted in a grossly improper manner and no one has denied that fact in any of the proceedings to date. Respondent never talked to the press - his remarks were made to persons of legal experience able to separate fact from fiction.

Petitioner was denied a hearing in the Bar Association proceedings after asking for that hearing and expressing his desire to present evidence on grounds that only a question of law was involved. Any doubts as to whether the words were accurately descriptive have to be resolved in favor of petitioner as well as any doubts as to

whether petitioner believed them to be true. Summary Judgement types standards should have been applied.

The following authorities support petitioner's position that the words were protected speech:

Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.E.2d 569 (1962) holding that an out of court publication regarding judicial proceedings was protected by the constitutional guaranty of freedom of speech and the press unless there is a clear and present danger of substantive evil resulting from the publication justifying the impairment of the constitutional right; however the substantive evil must be extremely serious and the degree of imminence extremely high before such utterance can be punished.

Stanford V. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed. 2d 306 (1989) holding that the institutions which the United States Constitution is supposed to limit include the United States Supreme Court itself and to state "it is for us" who are on the court to say what the constitution means, in the sense that the justices may base their decisions upon what they personally think instead of upon what the constitution originally meant and what society has democratically determined, is to abandon a court of judges of the law and replace it with a "committee of philosopher-kings"

Bradley V. Fisher, 80 U.S. 335, 20 L.Ed.2d 646 - Due process in disciplinary proceedings requires that the attorney be given an opportunity to defend at a hearing, and that the proceedings be essentially fair.

The cumulative punishment inflicted upon petitioner in the criminal contempt and disciplinary proceedings is without precedent in terms of punishment for speech. As Justice Brennan, joined by Justices Marshall, Blackmun and Stevens stated in his dissent in Stanford supra. 106 L.Ed.2d 306,333 - "There can be no doubt at this point in our constitutional history that the Eighth Amendment forbids

punishment that is wholly disproportionate to the blameworthiness of the offender." The contempt proceedings was criminal in nature and the punishment was enhanced in the disciplinary proceedings by citing language used in argument of that case. The license to practice law is not significantly different than other licenses required in other fields but in none of those fields could the actions of the enforcing court/Bar stand muster.

In Com. Transp. Cabinet v. Cornell, Ky. App., 796 S.W.2d 591 (1990) three primary factors were established to ascertain whether an administrative agency was arbitrary and prohibited by Section 2 of the Kentucky Constitution. These include whether statutory powers were exceeded; whether the agency's procedures afford procedural due process; Whether the individual has the opportunity to be heard and whether the agency's action is supported by substantial evidence. If any of these three tests are failed, the reviewing court may find that the agency's action was arbitrary.

It could not be known prior to the Opinion of the Kentucky Supreme Court sought to be reviewed, that the language of the pleadings in the contempt case, for which maximum penalties were imposed, would be cited as grounds for suspension from practice.

In Adams V. Gardner (1917) 176 Ky. 252, 195 S.w. 412, cited in Annotation, 12 A.L.R.3d 1408 (Attorneys Criticizing Court) the Kentucky Appellate Court considered an Affidavit for disqualification filed by an attorney stating that because of political and personal differences with the judge it would be impossible to obtain a fair trial.

The Affidavit was found to state pertinent information and could not be made the basis of a contempt proceeding since the statute provided the maximum punishment for the offense.

The Opinion and Order sought to be reviewed establishes a per se standard making punishable by suspension of license language deemed to be inappropriate. Such vagueness renders the opinion insupportable.

In Houston v. Hill, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed. 2d 398 an ordinance making it unlawful to "oppose, molest, abuse or interrupt any policeman in the exercise of his duty" was held by this Court to make criminal speech which is protected by the First Amendment and accords police "unguided discretion."

So too with the Opinion in question, the policemen being the Board of Governors of the Kentucky Bar Association. Kentucky has applied the same standards to a state statute providing that no person may "upbraid, insult or abuse a teacher" - deemed volatile of State and Federal constitutions in Com. v. Ashcraft, Ky. App. 1985) 691 S.W.2d 229.

The opinion sought to be reviewed suggests help in terms of professional counseling (p. 6) should be considered but those of different mental constitutions also have rights. As was once stated in Rawles v. Jenkins, (Ky. 1925) 212 Ky. 287, 279 S.W. 350, a statute which makes the obtaining or retention of a license (to transact business as a real estate broker or real estate salesman) depend on the moral fitness of the applicant of licensee is unconstitutional since under Section 1 of the Kentucky Constitution a citizen has the right to earn a living by any lawful calling and engage in any business or occupation that is not injurious to the public weal. Let the misguided speak - they may have something to say worth listening to.

WHEREFORE petitioner seeks profession counseling consisting of discretionary review.

Respectfully submitted,

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In The Supreme Court Of The United States

OCTOBER TERM

PETITION FOR WRIT OF CERTIORARI

APPENDIX "A"

Court Decisions and Motions Concerning Same

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TO BE PUBLISHED

Supreme Court of Kentucky

9 1996

96-SC-119-KB

KENTUCKY BAR ASSOCIATION COMPLAINANT

V. IN SUPREME COURT

LOUIS M. WALLER RESPONDENT

OPINION AND ORDER

In June of 1994, respondent, Louis M. Waller, represented a client in a civil matter in the Logan Circuit Court. During the pendency of the action, but after having granted an injunction, the regular judge recused himself from hearing the case "because his impartiality might reasonably be questioned." A special judge, the Hon. William Harris, was then appointed

After the appointment of Judge Harris, Waller filed a motion to set aside the earlier temporary injunction. On June 21, 1994, Waller filed a memorandum styled as "Legal Authorities Supporting the Motion to Dismiss" which contained the following introductory language:

Comes defendant, by counsel, and respectfully moves the Honorable Court, much better than that lying incompetent ass-hole it replaced if you graduated from the eighth grade .....

On June 24, 1994, Special Judge Harris ordered Waller to appear before the Logan Circuit Court and show cause why he should not be adjudged in contempt for filing such a scurrilous pleading. On June 29, 1994, Special Judge Harris rendered his findings of fact and conclusions of law,

and found Waller to be in contempt of the Logan Circuit Court for his intemperate language and for his failure "to maintain the required respect due this court and the regular Judge thereof." For this contempt Waller was fined $499.00 and sentenced to thirty days in the county jail. The Court of Appeals affirmed the contempt judgment and we denied discretionary review on January 11, 1996.

Based upon information provided by Special Judge Harris, the Inquiry Tribunal of the Kentucky Bar Association initiated a complaint against Waller, which charged him with one count of violating SCR 3.130-3.5 (c) for using disparaging language that was intended to disrupt the court; one count of violating SCR 3.130-4.4 for using language that served no purpose and was intended to embarrass the regular circuit judge; and one count of violating SCR 3.130-3.4 (e) when he used the specific language to describe the regular circuit judge who had recused, and thus knowingly and intentionally alluded to a matter not relevant to the cause under consideration by the court of supported by admissible evidence. The Inquiry Tribunal later issued an amended complaint in which Waller was charged with violating SCR 3.130-8.2 (a) for making an unfounded statement concerning the qualifications and integrity of Judge Fuqua. Waller submitted an answer to all charges. He was found not guilty of Counts I, II, and III, but a unanimous Board of Governors found Waller guilty of violating SCR 3.130-8.2 (a).

The Board then recommended that Waller be publicly reprimanded. on April 25, 1996, we noticed review of the decision of the Board of Governors pursuant to SCR 3.370 (8).

A review of the record in this proceedings reveals that respondent's pleadings in the underlying civil action, in the contempt proceedings, and in the later disciplinary proceedings, are generally scandalous and bizarre. When given an opportunity to show cause why he should not be found in contempt, respondent filed a document styled "Memorandum In Defense of the Use of the Term "ass hole"

(sic) to Draw the Attention of the Public to Corruption in Judicial Office" which, as indicated by its title, continued to assert corruption in the judicial system. He asserted that "[t]he undersigned would show the honorable reviewing tribunal that he does not know fear and if, while this case is pending in the courts, some interim punishment is deemed appropriate suggests, in all sincerity, flogging, caning or other physical torture." In an earlier pleading denominated "A Showing Of Cause," respondent asserted that the regular judge was a liar, a racist, that he was incompetent, and that he had a personal interest in proceedings before him.

Respondent went further and offered:

> "Do with me what you will, but it is and will be so done under like circumstances in the future. When this old honkey's sight fades, words once near seem far away, the pee runs down his leg in dribbles, his hands tremble and his wracked body aches, all that will remain is a wisp of a smile and a memory of a battle joined - first lost - then won."

Apparently not yet satisfied, respondent continued filing similar bizarre pleadings throughout the disciplinary process. In his "Answer to First Amended Complaint," respondent repeated his allegations of corruption and included a "P. S.", as follows:

> "And so I place this message in a bottle and set it adrift on a sea of papers - hoping that someone of common sense will read it and ask about the kind of future we want for our children and whether or not the [corruption in] the judiciary should be exposed. My own methods have been unorthodox but techniques of controlling public opinion and property derived from military counter-intelligence are equally so. My prayer is that you measure reality not form . . . [o]r is it too formidable (sic) a task and will you yourself have to forego a place at

the trough? There is a better and happier way and - with due temerity I claim to have found it - it requires one to identify an ass hole when he sees one."

Even in his brief to this Court, respondent takes the view that his statements were true, that the matter is not one that concerns the judiciary but rather "a private matter between the parties for which a private remedy exists," and that such comments are protected by the First Amendment to the United States Constitution. Such a claim is without merit. See. e.g., In re Sawver, 360 U.S. 622, 79 5. Ct. 1376, 3 L. Ed. 2d 1473 (1959); Kentucky Bar Association V. Heleringer, Ky., 602 S.W.2d 165, 167-68 (1980). Respondent's assertion that he was denied an evidentiary hearing to prove the truth of his allegations is also without merit as only a question of law was presented.

Respondent appears to believe that truth or some concept akin to truth, such as accuracy or correctness, is a defense to the charge against him. In this respect he has totally missed the point. There can never be a justification for a lawyer to use such scurrilous language with respect to a judge in pleadings or in open court. The reason is not that the judge is of such delicate sensibilities as to be unable to withstand the comment, but rather that such language promotes disrespect for the law and for the judicial system. Officers of the court are obligated to uphold the dignity of the Court of Justice and, at a minimum, this requires them to refrain from conduct of the type at issue here.

The Board of Governors recommended only that respondent be publicly reprimanded. While we have given due regard to the Board's recommendation and would agree if this were an isolated incident of intemperate language accompanied by a meaningful expression of regret, such is not the case. Respondent is utterly unrepentant and apparently intent on convincing this Court of the truth of his assertions. As such, we must impose a punishment of

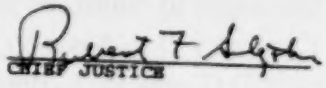
sufficient severity to forcefully inform respondent that he is wrong. Regardless of his personally-held views, if respondent desires to continue practicing law in the Commonwealth of Kentucky, he must conform his professional conduct to minimum acceptable standards. Consideration should be given to the desirability of professional counseling.

IT IS THEREFORE ORDERED:

That the respondent, Louis M. Waller, be, and he is hereby, suspended from the practice of law in Kentucky for a period of six (6) months, and is further ordered to pay the costs of this proceeding.

The respondent shall, within ten (10) days of the date of entry of this order, notify all courts in which he has matters pending and all clients for whom he is actively involved in litigation and similar legal matters of his inability to represent them, and of the necessity and urgency of promptly retaining new counsel. Such notification shall be by letter duly and timely placed in the United States Mail, and the respondent shall simultaneously and in the same manner provide a copy of all such letters to the Director of the Kentucky Bar Association. Stephens, C.J., and Baker, Graves, King, Lambert, and Wintersheimer, JJ., concur. Stumbo, J., files a separate opinion concurring in part and dissenting in part.

ENTERED:
August 29, 1996



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ATTORNEY FOR RESPONDENT:
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TO BE PUBLISHED

Supreme Court of Kentucky

96-SC-119-KB

KENTUCKY BAR ASSOCIATION COMPLAINANT

V. IN SUPREME COURT

LOUIS M. WALLER RESPONDENT

OPINION BY JUSTICE STUMBO
CONCURRING IN PART AND DISSENTING IN PART

Respectfully, I dissent from that part of the opinion which imposes a suspension from practice upon Mr. Waller. The Board of Governors saw fit to recommend only a public reprimand, a punishment with which I agree. Mr. Waller has previously been found to be in contempt of the Logan Circuit court for his words and has paid a fine in addition to serving a sentence in the county jail. There is no evidence in this record that until this case arose, he has been the recipient of discipline by this or any other Court in the course of nearly forty years of the practice of law. I would not further punish him by depriving him of his livelihood. To paraphrase Justice Leibson, "[forty] years of meritorious service at the bar ought to count for something."
Kentucky Bar Ass'n v. Jernigan, Ky., 737 S.W.2d 693, 695 (1987) (Leibson, J., dissenting).

Supreme Court of Kentucky

96-SC-119-KB

KENTUCKY BAR ASSOCIATION COMPLAINANT
VS.
LOUIS M. WALLER RESPONDENT

ORDER

Respondent's Motion to Stay Order Pending Ruling on Motion to Reconsider is granted in part. The Opinion and Order entered herein on August 29, 1996, is stayed from September 3, 1996, the date of filing of Respondent's motion to stay, until the date of this Order.

Respondent's motion to reconsider the Opinion and Order rendered herein on August 29, 1996, is hereby denied.

All concur.

ENTERED: SEPTEMBER 26, 1996.

CHIEF JUSTICE

RENDERED: June 23, 1995; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

ENTERED

JUN 29 1995

JIM NEALY, CLERK
By: Kat L Cox DC

NO. 94-CA-1845-MR

LOUIS M. WALLER — APPELLANT

APPEAL FROM LOGAN COUNTY CIRCUIT COURT
V. HONORABLE WILLIAM R. HARRIS, SPECIAL JUDGE
ACTION NO. 94-CI-259

HONORABLE WILLIAM R. HARRIS, SPECIAL JUDGE, LOGAN CIRCUIT COURT — APPELLEE

OPINION AFFIRMING

****

BEFORE: COMBS, GUDGEL, and SCHRODER, Judges.

CUDGEL, JUDGE: This is an appeal from a judgment entered by a special judge of the Logan Circuit Court in a contempt proceeding involving appellant Louis M. Waller, a practicing attorney.

After appellant was adjudged to be in contempt of the court, he was fined $499 and was sentenced to serve thirty days in jail.

On appeal, appellant contends that the court erred by finding him guilty of contempt in the circumstances presented here. We disagree. Hence, we affirm. Appellant was retained to represent a landowner in a dispute as to whether a particular roadway had acquired the status of a public road. Matters came to a head when appellant's client and her family erected a fence which blocked the roadway and thereby prevented

the opposing parties and their invitees from using the road to gain access to their adjacent properties. After a hearing which was conducted during the course of the subsequent litigation, the regular circuit. judge of the Logan Circuit Court ordered the fence to be removed until such time as the property dispute was adjudicated and it was finally determined whether appellant's client was entitled to, in effect, close the roadway. During the course of that hearing, it was acknowledged that the regular circuit judge should recuse himself because his impartiality might reasonably be questioned. Before recusing himself, however, the judge completed the hearing and, in order to preserve the status quo, directed that the fence should be temporarily removed pending a ruling on the merits of the parties' respective claims.

Appellant subsequently, on behalf of his client, filed a motion to dismiss which was supported by a separate memorandum of legal authorities. In the latter pleading, appellant stated in pertinent part as follows:

> Comes defendant, by counsel, and respectfully moves the Honorable Court, much better than that lying, incompetent ass hole it replaced if you graduated from the eighth grade . .

Copies of the offending pleading were served by mail upon the special circuit judge, the regular circuit judge, and opposing counsel.

Upon reading the offending portion of the document, the special judge sua sponte issued an order directing appellant to show cause why he should not be adjudged in contempt of the court. At the conclusion of the show cause hearing which was conducted on June 28, 1994, the court made detailed findings, adjudged appellant guilty of contempt and sentenced him to a fine of $499 and thirty days in jail. This appeal followed.

At the outset, we note that this jurisdiction adheres to the view that statements by counsel in pleadings and briefs

which manifest disrespect for the office of judge are contemptuous and may be summarily punished as such. See Fritz V. Barker, Ky., 801 S.W.2d 318 (1990); Roark V. King, Ky., 696 S.W.2d 787 (1985). Clearly, the above-quoted statements made in appellant's brief concerning the regular circuit judge in Logan County were intemperate, derogatory, and defamatory. Indeed, the statements manifested total disrespect for the judge and the office he holds. It follows, therefore, that the special judge was fully justified in finding those statements to be contemptuous. Id.

Basically, appellant's sole argument on appeal is that "under the circumstances of this case" his statements were not actionable as contempt. Although he cites three cases from foreign jurisdictions in support of his argument, each of those cases is either distinguishable on its facts or inapplicable. In Garland v. State, 325 S.E.2d 131 (Ga. 1985), as cited by appellant, derogatory statements about a trial judge who had recused himself were made to a reporter outside of court. The court found that although the statements were offensive, they did not and could not create a clear and present danger to the administration of justice since the judge was disqualified. However, Garland is distinguishable from the instant action because it involved out-of-court statements made about a recused judge. As recognized by the Garland court, in-court statements are subject to reasonable control through the use of the court's contempt power. Further, Gordon v. United States, 592 F.2d 1215 (1st. Cir. 1979), cert. denied, 441 U.S. 912, 60 L.Ed.2d 384, 99 S.Ct. 2011 (1979), provides no support for appellant's argument because the appellate court therein affirmed the contempt conviction of a pro se defendant who made derogatory statements in open court. Finally, we note that in Gilbert v. State, 648 P.2d 1226 (Okla. Cr. 1982), the questioned conduct was determined not to be contemptuous because Oklahoma does not recognize "the broader common law constructions of contempt" as such, and because the defendant's conduct did not occur entirely in the court's

immediate view or presence as is required by the applicable contempt statute. Id. at 1230. As this jurisdiction, by contrast, recognizes the inherent common law contempt power of courts, the teachings in Gilbert are simply inapposite and provide no support for appellant's position.

We note that the remaining arguments in appellant's brief are either irrelevant to the issue of whether the special judge erred, or they are meritless in that context. Further, although appellant in his reply brief refers to Fritz v. Barker, supra, and Roark v. King, he fails to make any persuasive argument as to why those cases did not authorize the trial court's action in punishing his contemptuous conduct below.

The court's order is affirmed.

ALL CONCUR.

APPELLANT PRO SE:
Louis M. Waller
Russellville, KY

ATTORNEY FOR APPELLEE:
Chris Gorman
Attorney General

William B. Pettus
Assistant Attorney General
Frankfort, KY

Supreme Court of Kentucky

95-SC-586-D
(94-CA-1845)

LOUIS M. WALLER — MOVANT

v. Logan Circuit Court
NO. 94-CI-259

WILLIAM R. HARRIS,
SPECIAL JUDGE,
LOGAN CIRCUIT COURT — RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED January 10, 1996.

Robert F. Stephens
Chief Justice

APPENDIX "B"

Page

1. Petitioner's Motion To Reconsider - Opinion Sought to be Reviewed..... 36-44

2. Notice of Review By Kentucky Supreme Court of Bar Association Decision..... 45-46

3. Motion For Discretionary Review in Contempt Case..... 47-50

SUPREME COURT OF KENTUCKY
96-SC-119-KB

KENTUCKY BAR ASSOCIATION COMPLAINANT

V. IN SUPREME COURT

LOUIS M. WALLER RESPONDENT

MOTION TO RECONSIDER

Louis M. Waller
Attorney pro se
P. O. Box 32
620 W. Seventh Street
Russellville, Ky. 42276
(502) 726 2058

CERTIFICATE
It is hereby certified that a true copy hereof was mailed to Jay R. Garrett Esq., Attorney for Kentucky Bar Association, 514 W. Main Street, Frankfort, Kentucky 40601 this September 3, 1996.

COMMONWEALTH OF KENTUCKY
SUPREME COURT
Case No. 96-SC-119-KB

KENTUCKY BAR ASSOCIATION COMPLAINANT

V. MOTION TO RECONSIDER

LOUIS M. WALLER RESPONDENT

* * * * * * *

Respondent respectfully moves the Court, pursuant to CR 76.38, to reconsider its Opinion and Order of August 29, 1996, on the following grounds:

1. THE OPINION CITES LANGUAGE INTENDED TO BE CONFIDENTIAL OR LANGUAGE USED IN DEFENDING ORIGINAL LANGUAGE OR IN JUSTIFYING THE PENALTY IMPOSED

This case involves language characterizations. Respondent has already, in separate contempt proceedings, been fined and imprisoned for the language of that memorandum.

Kentucky Supreme Court Rule 3.150 provides that lawyer discipline matters are confidential unless otherwise ordered by the Court. The Court had not authorized publication of that language prior to the publication of the Opinion sought to be reconsidered.

In his "p. s." to the Bar Association (language quoted at p. 2 middle of Opinion sought to be reconsidered) respondent asks the Bar Association , not this Court (recognizing that this Court implements its policies through the Bar Association) to address the question of how much power is compatible with the office of judge. The hoped for objective was a modification of the rules concerning judicial conduct to ban economic and political conflicts and to limit judges in owning and controlling public news media. The Bar

Association was asked whether it could put aside its vested interest in the status quo to undertake that effort. The reference to counter-intelligence refers to Judge Fuqua's (now Justice Fuqua's) service with army counter-intelligence and certain of the activities identified in the proceedings before the bar association.

Recitation of the "p. s." language in the manner of the Opinion suggests that it is part of a pleading or non-confidential document. That conclusion is erroneous.

The language at the top of page "4" is language from one of the papers in the contempt proceedings and is addressed to judge Harris. Judge Harris responded firmly. The use of the language as in the Opinion suggests that respondent is recklessly proceeding with one offensive diatribe after another in his court pleadings which is not the case. Such finding is erroneous.

2. LANGUAGE USED WAS NOT USED IN A PLEADING AND WAS NOT IN OPEN COURT.

The Opinion states that there can never be a justification for a lawyer to use such scurrilous language with respect to a judge pleadings or in open court. The sequence of events was (1) Judge Fuqua issued ex parte restraining order against respondent and his client; (2) Prior to hearing on the restraining order respondent moved the Court, in respectful language, to recuse on grounds that he was a partner of one of the parties; (3) Judge Fuqua refused to recuse, used the hearing to appeal to black church delegation in attendance to urge respondent's client not to follow his advice, urged that client not to follow respondent's advice, asked the black delegation to either listen to him or to respondent and engaged in other conduct indicating that he had departed from a judicial role; (4) Judge Fuqua recuses; (5) Respondent waits for transcript, confirms what had happened, researches the law and concludes that since Judge Fuqua had recused and was no longer in the case he could

criticize Judge Fuqua. The criticism was in a memorandum of legal authorities.

3. HARSH ACTION NOT REASONABLY ANTICIPATED BY RESPONDENT

The memorandum was filed June 21, 1994 - over two years ago. Respondent has not made any remarks in the interim, has numerous cases in progress, an appeal before the Court of Appeals, is 65 years of age, has a wife and one child. The obvious answer is - "you should have thought about that before you slandered Judge Fuqua" but the law has never before imposed such a harsh result for remarks made about a judge no longer in the case, the Bar Association recommended public reprimand (some private reprimand). A judge is kicked in the groin and the punishment is a reprimand. A judge is criticized when no longer in the case - 30 days in prison, $499.00 fine, our now livelihood is taken away for six months.

4. OPINION RESULT OF PASSION AND PREJUDICE

The Opinion states "Consideration should be given to the desirability of professional counseling." Apparently the Court seeks to balance the scales and malign petitioner. The reason is that respondent persists in his belief that the words used are accurately descriptive. The Court indicates that "if this were an isolated incident of intemperate language accompanied by a meaningful expression of regret" the bar recommendations would be followed but respondent is answering charges and making a defense. He has previously, in his Motion to Reconsider Charge dated June 1, 1995 stated:

> "Comes respondent, recognizing that the language used is not language that members of the Bar Association should utilize, that same is inappropriate in documents determinative of the facts and disruptive of the tribunal, even though not so intended (the Bar

Association found that the tribunal was not disrupted) and moves the tribunal to reconsider and to impose the sanction of PRIVATE REPRIMAND in lieu of further proceedings herein."

It had been anticipated that Chief Justice Stephens, whose close personal relationship with Judge Fuqua was given at the outset as the reason that Judge Fuqua deems himself immune to being answerable to the law, who is mentioned at several places in the proceedings and who recommended Judge Fuqua to the former governor for a last minute appointment to fill a vacancy on the Supreme Court, would disqualify. Instead he writes both the opinion denying discretionary review of the contempt case and this opinion. Talk about the appearance of unfairness!

There is no reasonable prospect that respondent will create any problem whatsoever to this Court or the Bar Association after an unblemished record of almost 40 years. What is in the craw of Chief Justice Stephens is that his buddy went down but if he did go down it took more than the words of Lou Waller to bring him down. Calling Lou Waller mad is contrary to all known evidence. Saying that Judge Stephens controls the Supreme Court is not.

4. KENTUCKY RULES OF PROFESSIONAL CONDUCT NOT VIOLATED

Respondent started practicing under the canons of legal ethics. Their problem was that they were not specific. The Code of Professional Responsibility made ethical conduct and lawyer-judge relationships formal. Effective January 1, 1990 that code was replaced by the Kentucky Rules of Professional Conduct which is about as specific as you can get on the subject. The Kentucky Bar Association by a vote of the Board of Governors 16-0 found no violation (although concluding that a person using that language has no place in the practice of law - a conclusion with which respondent agrees except under the unusual facts of this case) except for a charge brought over a year after the act and that

charge - if you address the matter fairly - has to fail because it turns on whether or not respondent believed the words to be true or acted with reckless disregard for truth. The "rulings from the bench" made part of the opinion of Judge Harris clearly state that Waller believed the things he expressed to be true and there can be no reckless disregard for the truth if this Court considers the hearing transcript and the other evidence produced to the bar association.

The opinion sought to be reviewed places emphasis upon the fact that this matter is a question of law, not fact. We then turn to the law. The law is in the Kentucky Rules of Professional Conduct which codify ethical behavior by lawyers.

That respondent was correct in his evaluation of the law is shown by the roll call vote of the Board of Governors of the Kentucky Bar Association (Findings of Fact, Conclusions of Law, and Opinion of the Board of Governors of the Kentucky Bar Association of November 17, 1995, page 5):

	Original			Amended
Charge	Count I	Count II	Count III	Count IV
Guilty	0	0	0	16
Not Guilty	16	16	16	0

Amended Count IV was improperly added over a year after the memorandum was written and was added solely because the Court of Appeals had affirmed the contempt case (No. 94-CA-1845-MR). The Court of Appeals had no evidence upon which to affirm the contempt case and that case could not be reviewed because respondent's motion for discretionary review (per Opinion of Chief Justice Stephens) was denied. The Court of Appeals, like this Court made statements (which will be forever more enshrined in the case books of lawyers all over the country) which respondent feels the record does not support - "Clearly, the above-quoted

statements made in appellant's brief concerning the regular circuit judge in Logan County were intemperate, derogatory and defamatory." C.A. Opinion rendered June 23, 1995 Case No. 94-CA-1845-MR p. 3). How can the justices Combs, Gudgel and Shroder know this to be true? The only evidence presented was the evidence of respondent, no witness testified against respondent, no witness testified for Judge Fuqua's character.

There may be a difference of opinion regarding the accuracy of the words but if respondent deemed them accurately descriptive and stated them in good faith after researching the law can it be said that he is guilty of professional misconduct so serious as to be punished more severely than persons dipping into trust accounts or getting witnesses to commit perjury?

The Board of Governors of the Kentucky Bar Association did not think so. Their vote was (p. 6 of Opinion) for punishment of:

Public Reprimand	11
Private Reprimand	5

Let it not be assumed that respondent does not recognize that many honorable men and women make up the judiciary of the Commonwealth of Kentucky and that to suggest that Chief Justice Stephens controls the court is abhorrent to their very oath of office. On the other hand do not let powerful men do wrong in the name of the law for the reason that they are powerful. Former Judge Fuqua and his friend Chief Justice Stephens are perhaps the most powerful men in Kentucky and they exercise power to accomplish their own objectives. Much of respondent's early legal experience was in other states other than Kentucky and with the Federal Trade Commission and General Electric Company. He sees the world differently but is keenly aware that Justice Stephens is not his master, his father nor does he put his pants on differently than does respondent. Once

outside the law he is as I am.

The finest traditions of the legal profession are often embodied in dissent. You dissent in your world, respondent dissents in his. He does so to make things better.

In his prehearing statement of July 25, 1994 in Case No. 94-CJ-00259 respondent stated:

> "The actions of the judge with respect to whom the remarks were made (Judge Fuqua) did not come from ignorance, mistake or the heat of controversy but rather were part of a customary practice and a belief that that judge was completely protected (being a close personal friend of the Chief Justice of the Kentucky Supreme Court and knowing that under existing law he could act with impunity)"

In his Motion to Reconsider of July 26, 1995 (KBA File 4505):

> "It is because respondent cares so much about the integrity of the judiciary that, for the first time since 1957, he uses extreme language the substantial equivalent of the substantial threat that he sees to the administration of justice..."

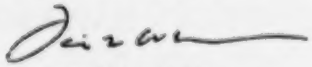
In his Motion to Dismiss of July 28, 1995 respondent argued that since Justice Stephens had recommended Judge Fuqua to the governor to fill an unexpired term on the Kentucky Supreme Court he could not have a fair trial in Kentucky. That motion was never ruled on.

In answering the KBA charges April 28, 1995 respondent asked for a hearing. He was denied that hearing on grounds that only an issue of law existed. If that be so and the law favors respondent's admittedly extreme and regrettable choice of words the charge should be disposed of by public reprimand. That result would be far less than the

scurrilous words of Justice Stephens.

WHEREFORE petitioner moves the Court to reconsider and further moves that Hon. Justice Stephens disqualify himself from further participation.

Respectfully submitted,



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4/25/96

Supreme Court of Kentucky

96-SC-119-KB

KENTUCKY BAR ASSOCIATION
COMPLAINANT

V. IN SUPREME COURT

LOUIS M. WALLER
RESPONDENT

CONFIDENTIAL
NOTICE OF REVIEW

Pursuant to SCR 3.370(8), Louis M. Waller, and the Director of the Kentucky Bar Association are hereby notified that this Court will review the decision of the Board of Governors in this proceeding.

Within forty (40) days of the date of the entry of this notice, Kentucky Bar Association, and Louis M. Waller, shall file ten (10) copies of their briefs in support of their position with the Clerk of the Supreme Court and the case shall stand submitted. Further briefing shall not be permitted.

All concur, except Stephens, C. J., not sitting.

ENTERED: April 25, 1996.

DEPUTY CHIEF JUSTICE

ATTORNEYS FOR COMPLAINANT:
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ATTORNEY FOR RESPONDENT:
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COMMONWEALTH OF KENTUCKY
SUPREME COURT
Case No. _____
Court of Appeals Case No. 94-CA-1845-MR
(Logan County Circuit Court 94-CI-00259)

LOUIS M. WALLER — MOVANT

V. MOTION FOR DISCRETIONARY REVIEW

HONORABLE WILLIAM R. HARRIS, SPECIAL JUDGE
LOGAN CIRCUIT COURT — APPELLEE

Movant respectfully moves the court to grant discretionary review of the Court of Appeals "Order Affirming" rendered June 23, 1995

Certificate

It is hereby certified that a true copy hereof was mailed to William B. Pettus Esq., Assistant General, Attorney for Hon. William R. Harris, Special Judge, P. O. Box 2000; Frankfort, Kentucky 40602-2000; George Fowler, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601 and a true copy was delivered to the office of Jim Nealy, Clerk, Logan Circuit Court, Courthouse, Russellville, Kentucky, all this 3d day of July, 1995.

Movant complies with CR 76.20 as follows:

(a) Movant acts pro se - his name is Louis M. Waller, his address is P. O. Box 32, 620 W. Seventh Street, Russellville, Kentucky 42276

(b) The date of the Opinion Affirming sought to be reviewed is June 23, 1995;

(c) A Supersedeas bond has not been excuted. Bail on appeal has not been made.

(d) A CLEAR AND CONCISE STATEMENT OF

(i) THE MATERIAL FACTS:

Former Logan Circuit Court trial judge conducted hearing under circumstances and in a manner justifying strong criticism, the effect of which was to place movant's client as substantial disadvantage in the litigation. He urged that client not to follow movant's advice, appealed to persons in the court room to "follow him", or to "follow movant", threatened to put the client in jail if she persisted in what was arguably a proper assertion of ownership of a disputed roadway claimed by the County and the judge's business partner, urged persons attending the hearing not to let the client continue for fear of loss of her home, signed restraining order without hearing and concealed his economic interest - all notwithstanding a motion to recuse for cause before the hearing was held.

It was movant's opinion, after a review of the applicable law that after that tria! judge was no longer in the case he could properly use strong critical language was set forth in a memorandum preamble as follows:

> "Comes defendant, by counsel, and respectfully moves the Honorable Court, much better than that lying, incompetent ass-hole it replaced if you graduated from the eight grade ..."

The conclusion was predicated upon decisions of the United States Supreme Court, as from other states,

the matter not having previously been considered by the Supreme Court of Kentucky. It was believed that the remarks alone were defensible if they did not interfere with the case - which they did not. The case moved forward without interruption. Movant is condemned for the language alone. No witness or evidence was presented against movant at the show cause hearing held.

(ii) THE QUESTION OF LAW INVOLVED

Are words alone, no matter how gross, sufficient to sustain a finding of criminal contempt when addressed to a court about whom the words are not directed and where the judge who is the subject of those words has recused and is not involved in the case in any way?

Must there be some showing of effect or are the words alone enough? To what extent do the free speech guarantees of the first amendments to the United States and the Kentucky constitutions protect the author of the words?

(iii) THE SPECIFIC REASON WHY THE JUDGMENT SHOULD BE REVIEWED

The law as enunciated by the trial court and the Court of Appeals is contrary to the law of the Supreme Court of the United States and that of all other jurisdictions which have addressed the questions of law are involved.

Whether statements are made in the presence of the court or outside of that presence they are protected by the guarantee of freedom of speech of the First Amendment to the Constitutions of this commonwealth and of the United States of America and by the Fourteenth Amendment to the Constitution of the United States. Contemptuous statements are

not so protected. The test applied to determine whether a statement is contemptuous is whether there is a clear and present danger to the orderly administration of justice. Wood v. Georgia, 370 U.S. 375, 82 S. Ct. 1364, 8 L Ed. 2d 569 (1962). Neither "inherent tendency" nor "reasonable tendency" is enough to justify a restriction on free expression. Bridges v. California, 314 U.S. 252, 373, 62 s. Ct. 190, 198, 86 L Ed. 2d 192 (1941). These questions are discussed by the Supreme Court of Georgia in Garland v. The State, 325 S. E. 2d 131 (Ga. 1985) in appendix hereto and Garland, in turn, is cited at 17 Am Jur2d Sec. 84 (1990).

The answers to the question of law is that no, words alone are enough to sustain criminal contempt. There must be a showing of their effect. The words, odious, unseemly and intemperate as they may appear, are protected free speech.

(e) The movant does not have a petition for rehearing or motion for reconsideration pending in the Court of Appeals.

Respectfully submitted,

Louis M. Waller

APPENDIX "C"

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SUPREME COURT RULE SCR 3. 130 (8.2)
(Rule found to have been violated)..... 51-52

SCR 3.130(8.2)
Judicial and legal officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Adopted by Order 89-1, eff. 1-1-90

Note: SCR 3.130(8.2) contains provisions analogous to former EC 8-6 and DR 8-102, withdrawn by Supreme Court Order 89-1, eff. 1-1-90.

COMMENTARY 1989:

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

NOTES ON DECISIONS AND OPINIONS

737 SW(2d) 693 (Ky 1987), Kentucky Bar Assn v Jernigan. Where a long history of animosity and petty quarreling exists between an attorney and a judge, and the judge allegedly calls the attorney a profane and provocative name as a result of which the attorney kicks the judge in the groin in the hallway of the courthouse, and later the attorney publishes an article in the local newspaper referring to the judge in scurrilous language, such conduct by the attorney constitutes ethical violations for which a public reprimand is warranted.

696 SW(2d) 787 (Ky 1985), Roark v King. An attorney who signs a brief which includes intemperate remarks clearly indicative of a lack of respect for the court and the office of judge will be found guilty of contempt and fined accordingly.

602 SW(2d) 165 (Ky 1980), Kentucky Bar Assn v Heleringer; cert denied 449 US 1101, 101 SCt 898,66 LEd(2d) 828 (1981). An attorney called the behavior of a judge "highly unethical and grossly unfair" when the judge issued a temporary restraining order against enforcing an abortion ordinance.

APPENDIX "D"

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1. "A Showing of Cause" in Contempt Case 06/25/94 (quoted from in opinion sought to be Reviewed)... 53-59

2. Memorandum in Defense of the use of the term "ass hole" to draw the attention of the public to corruption in Judicial Office in Contempt Case. (quoted from in opinion sought to be reviewed) 06/27/94 60-63
3. Motion to set aside contempt judgment of June 29, 1994. 06/30/94..... 64-66
4. Motion to set aside Amended Contempt Order and Recuse in Contempt Case. 07/08/94..... 67-71
5. Civil Appeal Prehearing Statement in Contempt Case. 07/25/94 (referring to friendship with Chief Justice)..... 72-77
6. Answer of Petitioner in Disciplinary Case 08/03/94..... 78-79
7. Request for Grand Jury Investigation 11/03/94..... 80-81
8. Motion to Reconsider in Disciplinary Case 07/26/95..... 82-83
9. Motion to Dismiss in Disciplinary Case 07/28/95..... 84-87
10. Answer to First Amended Complaint in Disciplinary Case. 08/09/95..... 88-90

COMMONWEALTH OF KENTUCKY
7TH JUDICIAL CIRCUIT

LOGAN CIRCUIT COURT CASE NO. 94C1259

BENNY BALDWIN, ET AL. PLAINTIFFS

VS. In Re: Contempt Proceedings Against
Louis M. Waller

MARGARET YARBROUGH DEFENDANT

A SHOWING OF CAUSE

MAY IT PLEASE THIS HONORABLE COURT:

The Court having ordered Louis M. Waller to show cause why he should not be held in contempt for referring to the regular Judge of this Court as a "lying, incompetent ass-hole" the undersigned presents to the Court the following words:

The Honorable regular judge is a liar because he has uttered the following lies:

Lie No. 1) Tr. p. 9 L6 - "and I got the impression that nobody had really presented any documents or anything formally."
In truth and in fact the Honorable Judge knew full well that counsel had presented formal documentation, copies of deeds, maps and minutes of the Fiscal Court.

Lie No. 2) Tr. p. 5 L 2 - THE COURT. Ok let me make one thing clear. I don't own and property on 68, that I can think of.

In truth the Court owned only one property with the Kemps and that property is located on 68.

Lie No. 3) Tr. p. 30 L. 9 - THE COURT: "And you know that in 90 percent of the cases, when you file something like this, you bring it to my office and let me read it so that I can...

In truth counsel has not brought one copy of a filed document to the judge before hearing in the past five years nor is it the practice in this Court to do so, nor are there and local rules so requiring.

Lie No. 4) Tr. p. 30 L. 15 - "or you file a copy." Not so and readily ascertained not to be so by inquiry of members of the local bar.

Lie No. 5) Tr. p. 30 L. 19 - "well it is the practice of this Court. Every lawyer in this Court does it." In truth the judge's secretary, before each hearing, customarily gathers the files on cases set to be heard from the office of the Logan Circuit Court.

Lie No. 6) MR. WALLER: Why didn't you call me(before the temporary restraining order was issued against counsel)?

THE COURT proceeded to read a part of Rule 65.03 not pertaining to Ex Parte orders. Knowing such reading would mislead and lend credibility to his actions.

Lie No. 7) Tr. p. 186 L 6 THE COURT: "Yeah and she's just sat there and you're (referring to counsel) let her sit there and testify that they have been using it by adverse possession."

IN TRUTH counsel could not, under the rules, interfere with cross-examination and let other than truthful, responsive answers be given. The Court knew this but attempted by the statement to discredit counsel with his client and persons in attendance.

If the Court can disparage counsel when he is

following the rules cannot disparage the Court when it is not doing so ?

Not content with disparaging counsel the Court added (Tr. 182 p. 15): "we're doing it to you. We're doing it to you man."

The honorable regular judge is incompetent because he engages in conduct which any eighth grade graduate would know is improper for one on the bench, specifically the Court did address remarks directly to persons in attendance, who were not under oath and who were not called as witnesses by any of the parties.

TR 188 L.20 THE COURT (Raps gavel) Now we're going to come to order. This is not the law of the jungle. This is supposed to be a civilized proceeding---all right, she wants to speak. Do you want to speak out to everybody? PATRICIA SYDNOR: Do I need to be sworn? THE COURT: No, No, you don't need to be sworn. I believe...

A hearing on motion for temporary injunction was then turned into a public debate without rules leaving counsel no means to control his case or what was coming into the record and exposing his client to the damage of whatever statement might be forthcoming.

TR 183 L. 9 THE COURT: I don't know. Reverend McKinney, I appeal to you and Mr. Neblett (persons sitting in the courtroom and not called as witnesses by either party) Do not let this lady sit here and make a terrible mistake. MRS. YARBROUGH: I'm not making no mistake. THE COURT: And if somebody gets hurt out there, I don't want to send her to the jail or the penitentiary:

Thus the Court alternately pressured and threatened, not to achieve a laudable end (he don't give a ____ whether Mrs. Yarbrough goes down the tubes or not, but he is very concerned that the case which he engineered against her is going down the tubes and his controlled county officials are looking very incompetent).

The Court attempted to demean counsel by suggestions of incompetence and lack of familiarity with

standard procedures and the law: TR 185 p. 8 - "Man, they need some. Anybody that doesn't know northeast from northwest..."). TR 185 L. 14 "I think I know where the problem come from).

Desperate to find some weakness or opening in defendants case so that he could pass the knife over to his trusty side-kick Fred Greene for the carving he hit upon the notion that if a survey could be found perhaps it would provide some opening. Mrs. Yarbrough had had a survey made of the two acre portion of the 20 acres owned by her family for her own purposes. Perhaps this would offer the opening.

TR 169 L. 16 - THE COURT: I mean, it's hard for me to understand why they would survey anything else (other than the 20 acres)

THE COURT: For what purposes did you have it surveyed? WITNESS: Just about 2 acres of it. MR. WALLER: The Judge is asking you why did you have it surveyed? THE COURT: Why just two acres? WITNESS: Well, did you have a reason for surveying to get the 2 acres. MR. GREENE: How many acres do you claim to own? WITNESS: There's 2 acres down there. MR. WALLER: She has an interest in the 20 acre tract... WITNESS: I have every business to be there. MR. WALLER: I don't think she has to justify why.

The Court knew that all was required to resolve the dispute was a determination of where the beginning point was of the Maggie Merritt Deed of April 4, 1916: "Beginning at a stake in the Bowling Green Road, corner to John Dawson." If John Dawson's corner was on the west side of the Ed Mason Road the matter was concluded and only the first call "running thence with a line of said Dawson Southwardly to the North edge of a road" is needed or relevant. It knew that if somehow the corner to John Dawson could be identified as being on the east side of the Merritt property it could use the road referred to as the road in dispute. There ensued a protracted discussion over a diagram

of the property (TR 172-181 in which the Court probed for some mistake, dropping innuendo in the process:

TR 174 L 11 - THE COURT: And you've proved it with your own deed (that the starting point was on the east side of the Merritt property) ... L20 - THE COURT: Where? Show me where it says on the east side of her property (L. 24): Well, you do it. Go get a surveyor to plat it (note that the Court had acknowledged that surveys are expensive in questioning Mrs. Yarbrough's 2 acre survey - TR 170 L. 7
THE COURT: "I mean surveyors don't come cheap, and it must have been a reason for surveying to get the 2 acres and the Court knew Mrs. Yarbrough was a poor person (TR 191 L. 17). The Court suggested that a survey was a standard practice, knowing that it was unneeded and that the Surveyor could only begin at the beginning, go on until the end and then stop (as Alice was told in Lewis Carroll's "Through the Looking Glass").

Being much pleased with this reversing of calls as a way for plaintiffs and his wholly-owned subsidiary, Logan County, to win the Court gave new signals to County Attorney Noe - TR 193 L 3 that perhaps he should not jump in (subsequent heat causing a reversal of this position).

The Honorable Regular Judge gave person in attendance the opportunity to either "listen to Mr. Waller, or you can listen to me", bringing to bear all of the majesty of the Court in hopes of a fruitful result. unfortunately for his Honor the results were not as expected.

Not content the Court needled Margaret Yarbrough (who was double-teamed by counsel on cross examination (she managed very well, thank you), asking her if she had not erected a spite fence (Tr. 184 p. 3) knowing that the fence erected did not fit the definition of a spite fence and advising her that there were laws against spite fences.

THE REGULAR JUDGE IS AN ASS HOLE

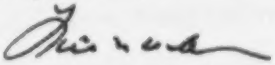
During his diatribe the Court referred to Rev. James McKinney as a "Tom" (not in the transcript but he will be at the hearing to testify to it and how he used it in his next sermon as an example of bigotry. Failure to afford the protection of the law to black citizens and failure of this attorney to speak plain words which can be understood (these citizens being persons of good understanding who make their own determination of whether or not the appellation is appropriate) is a disservice and inadequate representation. If our judges are so thin-skinned that free speech and equal protection and the absolute privilege accorded speech in court proceedings are to be substituted for by some kind of gag order or reduction of counsel to a mute spokesman then the system needs changing and this goat is ready to be sacrificed to do so. Counsel is privileged to be spokesman in this one instance (Tr 181 p. 24) and his actions conform to those of his client.

Although unqualified to tie her shoes, this honkey takes as his example, Mrs. Margaret Yarbrough, whose character, quiet demeanor and courage are an example for members of the bar and judiciary alike and, with equal admission of unworthiness states: Jesus Christ is on my side -Tr. 192

This is my defense - if any it be. Do with me what you will but it is and will be so done under like circumstances in the future. When this old honkey's sight fades, words once near seem far away, the pee runs down his leg in dribbles, his hands tremble and his wracked body aches, all that will remain is a wisp of a smile and a memory of a battle joined - first lost - then won.

It is enough.

Respectfully submitted,



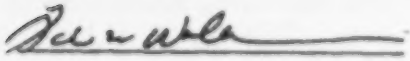
Louis Morton Waller
Pro Se
P. O. Box 32
139 W. Fourth Street
Russellville, Ky.
42276

CERTIFICATE

It is hereby certified that a true copy hereof was mailed to the following this June 25, 1994: Hon. William R. Harris, Special Judge, Logan Circuit Court, P.O. Box 262, Franklin, Kentucky 42134; Hon. William G. Fuqua, Judge, Logan Circuit Court, Courthouse, Russellville, Kentucky 42276; Fred Greene Esq., Attorney for plaintiffs Baldwin, Kemp and Bailey, 301 W. 3d Street, P. O. Box 306, Russellville, Kentucky 42276; Thomas Noe III Esq., Logan County Attorney, 317 W. Fourth Street, Russellville, Kentucky 42276.

NOTICE OF HEARING

Notice is given that the within Showing of Cause will be brought on for hearing in the court room of the above Court on Tuesday, June 28, 1994 at the hour of 2:00 p.m. or as soon thereafter as counsel can be heard.



6/27/94

COMMONWEALTH OF KENTUCKY
7TH JUDICIAL CIRCUIT

LOGAN COUNTY COURT CASE NO. 94-CI-259
BENNY BALDWIN, ET UX,
KEMP PAVING, INC., ET UX, AND
MITCHELL BAILEY, ET UX, AND
LOGAN COUNTY, KENTUCKY PLAINTIFFS

VS. In Re: Contempt Proceedings Against
Louis M. Waller

MARGARET YARBROUGH DEFENDANT

MEMORANDUM IN DEFENSE OF THE TERM
"ASS HOLE"
TO DRAW THE ATTENTION OF THE PUBLIC TO
CORRUPTION IN JUDICIAL OFFICE

MAY IT PLEASE THIS HONORABLE COURT:

The undersigned would first assure this Court that it is not dealing with a madman set upon destruction of the courts of this Commonwealth and that he will never again (he has never in the past) use the demeaning appellation "ass hole" to refer to this or any other Court, this being a one time use to test the issue in the Supreme Court of the United States, and that the service of the Court is the true objective. The accused has used, and will continue to use, respectful language but the use will be different and the indulgence of the tribunal is solicited in the use of metaphor and simile to communicate, the Accused customarily using that means of speech.

The undersigned would next make most earnest apology for his actions and speech, recognizing that the proper forum for

his remarks is the Judicial Retirement and Removal Commission and seeking not to divert the attention and energy of a busy judge to a personal situation. If that attention is not to be wasted in cutting down some old bastard lawyer a focus upon the true intent and the need to speak out will better serve the Court and the bar.

The undersigned would next remind the reviewing tribunal that since his admission to the bar in 1957 he has never before faced a contempt hearing, never before faced a serious charge before the Kentucky Bar Association and has never referred to any person in the language herein at issue.

The undersigned would next assure the reviewing tribunal that he is not going through some type of mid-life crisis or mental thing but in passing would point out that when his death was imminent six months ago his one regret was that he had not taken the action for which he is now accused.

The undersigned would next assure the reviewing tribunal that the problems addressed in the speech questioned are real and are real and are really depriving a segment of Logan County society of its property and freedom.

The undersigned would show the honorable reviewing tribunal that he does not know fear and if, while this case is pending in the courts, some interim punishment is deemed appropriate suggests, in all sincerity, flogging, caning or other physical torture. Only let me continue to practice for those who need representation.

The undersigned is a man of modest means with a family to support, a house refinanced to pay medical bills and has expended thousands of dollars in personal assets to support the causes of persons otherwise unable to have representation. The acts of this regular Court have depleted the income ordinarily available by losses of causes which ought to have been won and the numbing costs of appeals which hang forever in an exhausted Court of Appeals.

The words were uttered after the regular judge had recused and hence in no way interfere with the progress of this, or any other case. They were uttered with respect with a past

matter (i.e. whether or not a temporary injunction should issue). See appropriate authority.

WHEREFORE the Accused respectfully moves the Court to recognize the circumstances, the extreme provocation of a judge who had departed from his role as a judge and become an advocate.

Your Accused would also show this Honorable Tribunal that this case came on the heels of another in which the Court bombed counsel in like manner (C.A. No. 92-CI-603). Knowing time limitations do not permit this Tribunal to investigate law suits involving complex facts and that we deal with actions which, if looked at selectively, have a plausible basis for the ruling given, I attach two, noting that in C.A. 93-CA-000955 the judge lied to me when he induced me to dismiss foreclosure actions pending and then dismissed the new action based, in part, upon the statute of limitations. The Court first started ruling on motions generally after this appeal was taken - and yes I know you are not here to try Judge Fuqua - just thought you might consider it in mitigation.

Respectfully submitted,

Louis M. Waller
Attorney pro se
P. O. Box 32
139 W. Fourth Street
Russellville, Kentucky
42276

Certificate

It is hereby certified that a true copy hereof was mailed to Hon. William Harris, Special Judge, Logan Circuit Court, P. O. Box 262, Franklin, Kentucky 42134 and a true copy was delivered to the offices of the following, all this June 27, 1994: Hon. William G. Fuqua, Judge, Logan Circuit Court, Court House, Russellville, Kentucky; Thomas A. Noe Esq., Logan County Attorney, P. O. Box 608, 317 W. Fourth Street, Russellville, Kentucky 42276; Fred Greene Esq., 301 W. Third Street, Russellville, Kentucky.

COMMONWEALTH OF KENTUCKY
7TH JUDICIAL CIRCUIT

LOGAN CIRCUIT COURT CASE NO. 94-CI-00259

BENNY BALDWIN, ET UX,
KEMP PAVING, INC., AND
MITCHELL BAILEY, ET UX. PLAINTIFFS
AND
LOGAN COUNTY,
KENTUCKY INTERVENING PLAINTIFF

VS. In Re: Contempt Proceedings
Against Louis M. Waller

DEFENDANT MARGARET YARBROUGH

MOTION TO SET ASIDE CONTEMPT JUDGMENT
OF JUNE 29, 1994

Comes Louis M. Waller and respectfully moves this honorable Court to set aside the Contempt Judgment entered herein June 29, 1994 on the following grounds:

1. The said Judgment does not conform to the ruling made by this Court in open court. specifically it does not reflect the statement that movant had other avenues to address the matters with respect to which salty language was used - i.e. grand jury, the FBI. and the Judicial Retirement and Removal Commission.
Movant was not asked about this area to ascertain what steps had been taken and presumably it was given weight in arriving at the sentence.

Movant would show the Court that he made exhaustive efforts along the lines indicated, traveling to the Federal Building in Louisville, Kentucky with his files and

evidence and being referred to the Bowling Green Office. Movant discussed the charges against William G. Fuqua with the Special Agent in charge and that agent made an appointment to discuss the matter with movant in his Russellville, Office, stating that he and identified State Detective would meet with movant, all of the same occurring on or about August 31, 1993. The said FBI representative did not show up for the appointment and was advised that movant would take care of the matter himself.

Movant contacted the United States Attorney Re: requested a Federal Grand, Jury Investigation and was advised that Federal Grand Jury was convened only when he, the United States Attorney deemed it appropriate and the circumstances did not suggest that it was appropriate. The United States Attorney was advised that movant would take care of it himself. The accused has friends in high places, being a close personal friend of Robert F. Stephens, Chief Justice of the Supreme Court of Kentucky, and movant, endeavoring in all respects not to be paranoid, nor to exaggerate the subject matter, would show this Court that it was indeed the last resort and that the measures taken were calculated, movant believing that the Court of public opinion is, ultimately, the only Court worth trusting.

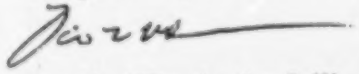
Movant would next show the Court that he laid out at the hearing for contempt a strong case against William G. Fuqua but that this Court "called the allegations unsubstantiated" deleting this remark from his written judgment. If this Court really believes that put it in writing and the gross appellation rendered previously may well be duplicated.

2. Movant would show the Court that he has recently received a call from the editor of the "News Democrat" requesting a formal picture -"your friends would like it" but the true purpose is believed to be to characterize movant as a publicity seeker. This newspaper and the local radio station are active participants in the scheme of corruption rendered

plain by proof and a distortion of the facts is only corrected by quotations from the Bowling Green newspaper.

WHEREFORE movant prays that the Order be set aside and that he be remanded from custody. Alternatively movant prays that he be afforded 30 days within which to pay his fine, one appeal now going by the boards and the Yarbrough transcript exhausting all available cash.

Respectfully Submitted,



Louis ("I'm in the Jailhouse Now")
Waller
100 N. Owen Street
Russellville, Ky. 42276

Certificate: It is hereby certified that a true copy hereof was mailed to Hon. William, R. Harris, Special, Judge, Logan Circuit Court, P.O. Box 262, Franklin, Kentucky 42134: Hon. William G. Fuqua (personal delivery), Court House, Russellville, Kentucky and copies were hand delivered to Thomas A. Noe III Esq., Logan County Attorney, P. O. Box 608, 317 W. Fourth Street, Russellville? Kentucky 42276; Fred Greene Esq., 301 W. Third Street, .Russellville, Kentucky 42276

NOW HEAR THESE WORDS - THE TIME IS NEAR -
"... and Lucifer heard this but replied that he would let new legions go forth to the small places of the earth where people slept deeply and his messengers would wear armour of the mind, stronger even than iron and invisible to all but those who come from afar."

_____

Louis M. Waller

7/8/94

COMMONWEALTH OF KENTUCKY
7TH JUDICIAL CIRCUIT

LOGAN CIRCUIT COURT CASE NO. 94-CI-00259

BENNY BALDWIN, ET UX,
KEMP PAVING, INC.,
AND MITCHELL BAILEY ET UX. PLAINTIFFS
AND
LOGAN COUNTY,
KENTUCKY INTERVENING PLAINTIFFS

VS. In Re: Contempt Proceedings
Louis M. Waller
MARGARET YARBROUGH DEFENDANT

MOTION TO SET ASIDE ORDER AND RECUSE

Comes Louis M. Waller, pro se, and moves the Court to set aside its "Order Amending June 29, 1994 Contempt Judgment" and to recuse on the following grounds:

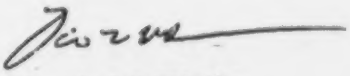
1. Movant is an Officer of the Court and is entitled to the respect of that Court. He is not a criminal, animal or lunatic.

2. Movant has elected, at considerable sacrifice to himself and to his family, to seek to expand the law to permit members of the bar to criticize judicial acts.

3. This Court has treated movant as it would a criminal, animal or lunatic, has conferred with others having a vested interest in characterizing movant in that manner and will not

deal with movant as another man notwithstanding reasonable solicitation of understanding. It has refused to entertain the possibility that the accused judge is wrong even though evidence of grievous wrong is overwhelming. By its actions it has damned movant for the crime of speaking out no matter what the facts. The evil of that damnation far exceeds the evil of biting, crude words which should be tested against the context in which they were uttered. Appropriate authority in support of the motion is attached.

WHEREFORE recusal is earnestly solicited and hearing sought at the earliest convenient date. Certification of service as on attachment.



Louis M. Waller
Attorney pro se
P. O. Box 32
139 W. Fourth Street
Russellville, Ky. 42276

AUTHORITIES CITED IN SUPPORT OF MOTION

1. Oliver Wendel Homes Jr. 1841-1935 - Law and the Court (1913) "Judges are apt to be naif, simple-minded men, and they need something of Mephistopheles. We too need education in the obvious- to lear to transcend our own convictions and to leave room for much that we hold dear to be done away with short of revolution by the orderly change of law."

2. Learned Hand 1872-1961 Morals in Public Life
"I beseech ye in the bowels of Christ, think that ye may be mistaken. I should like to have that written over the portals of every church, every school, and every courthouse, and may I say, of every legislative body in the United States. I should like to have every Court befin "I beseech ye in the bowels of Christ, think that we may be mistaken."

3. Felix Frankfurter 1882-1965 Baker v. Carr, 369 U.S. 186, 270 "In a democratic society like ours, relief must come through an aroused popular conscience of the people's representatives."

4. Hugo LaFayette Black 1886-1971 Interview Before the American Jewish Congress April 14, 1962
"My view is, without deviation, without exception, without any ifs, buts or whereases, that freedom of speech means that you shall not do something to people either for the views they have or the views they express or the words they speak or write. I am for the First Amendment from the first word to the last, I believe it means what it says."

New York Times Company v. Sullivan, 376 US 254 (1964)
"An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment"

5. Robert Houghwout Jackson 1892-1954 Terminello v. Chicago, 337 US 1, 37 (1949)
"There is a danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert its Constitutional Bill of Rights into a suicide pact."

American Communications Association v. Douds, 339 US 382, 442 (1950)
"It is not the function of our government to keep the citizen from falling into error, it is the function of the citizen to keep the government from falling into error."

6. William Orville Douglas 1898-1980 (1/20/80)
"The first amendment makes confidence in the common sense of our people and the maturity of their judgment the great postulate of our democracy."

7. Edward Potts Cheyney, Social and Industrial History of England (1901)

The law locks up both man and woman
who steals the goose from off the common
But lets the grater felon loose
Who steals the common from the goose.

8. John Marshall 1755-1835 Marbury V. Madison I Cranch 1317 (1803) "It is emphatically the province and duty of the judicial department to say what the law is.. .if two laws conflict with each other, the courts must decide on the operation of each ... if two laws conflict with each other, the courts must decide on the operation of each... this is the very essence of judicial duty"

9. Sir Thomas More 1478-1535 Utopia 1516 of Law and Magistrates "They have no lawyers among them, for they consider them as a sort of people whose profession it is to disguise matters."

10. Sophocles Antigone (442 b.c.) "How dreadful it is when the right judge judges wrong."

11. Black Elk 1863-1950 Black Elk Speaks, Being the Life Story of a Holy Man of the Ogala

"Everything an indian does is in a circle, and that is because the power of the world always works in circles and everything tries to be round. In the old days when we were a strong and happy people, all our power came to us from the sacred loop of the nation, and so long as the hoop was unbroken the people flourished.. even the seasons form a great circle in their changing, and always come back again to where they were. The life of a man is a circle from childhood to childhood and so it is in everything where power moves. Our tepees were round like the nests of birds, and these were always set in a circle, the nations hoop."

Respectfully submitted,

Louis M. Waller
Attorney pro se
P. O. Box 32
139 W. Fourth Street
Russellville, Ky. 42276

Certificate: It is hereby certified that a true copy hereof was mailed to the following this the 8th day of July, 1994: Hon. William R. Harris, Special Judge, Logan Circuit Court, P. O. Box 262, Franklin, Kentucky 42134; Hon. William G. Fuqua, Courthouse, Russellville, Ky. 42276, Thomas A. Noe III Esq., Logan County Attorney, P. O. Box 608, 317 W. Fourth Street, Russellville, Kentucky 42276; Fred Greene Esq., Greene & Joines, 301 W. Thirs Street, P. O. Box 306, Russellville, Kentucky 42276.

COURT OF APPEALS OF KENTUCKY

Internal Use Only

CIVIL APPEAL PREHEARING STATEMENT
Please consult CR 76.14(3) In completing this form.

Louis M. Waller APPELLANT

V. Court of Appeals Docket No._____

Hon. William R. Harris, APPELLEE
Special Judge
Logan Circuit Court

APPEAL FROM: Contempt Judgment, Logan
Circuit Court Action NO. 94-CI-00259

TRIAL JUDGE: Hon. William R. Harris

DATE JUDGMENT/ORDER APPEALED FROM ENTERED:
June 29, 1994 as Amended and Further Amended

DATE NOTICE OF APPEAL FILED: July 25, 1994
NOTICE OF CROSS APPEAL: _____

COUNSEL FOR: Louis M. Waller, pro se) (APPELLANT)

( ) Plaintiff; ( ) Defendant;
(x) Other (specify) in Trial court Contemnor

Appellant Counsel: **Name** Louis M. Waller
Address P. O. Box 32, 139 W. Fourth St.
City/State Russellville, Kentucky 42276
Telephone (502) 726 2058

COUNSEL FOR Hon. William R. Harris, Special Judge
(APPELLEE)

( ) Plaintiff; ( ) Defendant;
(x) Other (specify) in Trial Court Trial Judge

APPELLEE COUNSEL: Name _____
Address _____
City/State _____
Telephone _____

1. Has this case been before an Appellate Court Previously
No
If so, when and identity

_____

2. Type of litigation (type of order; e.g., automobile negligence, breach of contract, domestic, product liability, property dispute, tax, UCC, zoning, etc.) ** Attach a copy of the complaint) **

Contempt

3. Circuit Court Disposition (type of order; e.g., Default or Summary Judgment, Dismissal, etc. (Attach a copy of any written opinion by trial court.)

Contempt Judgment

4. Relief:
(a) Damages: Amount Sought $ _____
Amount Granted $ _____

(b) Injunction ( ) Granted ( ) Denied

(c) Other: 30 days imprisonment, Fine of $499.00

5. Facts and Issues (Brief statement of facts, claims, defenses, and Issues litigated.) (Attach a separate sheet if necessary.)
Characterization of former Judge as "lying, incompetent ass hole" (see attached) by counsel in preamble of Memorandum of Law.

6. Briefly state issues proposed to be raised on appeal (including jurisdictional challenges) and any question of first impression. (Attach a separate sheet if necessary.)

1. Characterization of former judge should be measured in context;
2. Judge should be subject to contempt himself when he departs from the law, assumes the role of advocate, makes personal attacks on counsel, misstates existing procedures existent in the Court, throws open hearing to allow unsworn participation of persons in attendance, makes his misstatements of fact knowingly and permits counsel for a non-party to participate jointly with opposing counsel in cross-examination

7. Will the appeal turn on an interpretation or application of a particular case or statute?
yes ___ If so, cite case or statute number. Lewis v. Rice, Ky., 261 SW2d 804 (195)

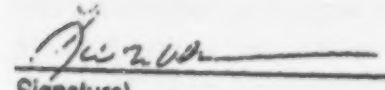
8. Is there any known case involving substantially the same issue now pending before either appellate court of this state?
yes ___ If so, identify. 93-CA-000955 involves substantially the same type of action by former judge.

9. Should this appeal be designated as a special appeal under CR 76.15? No Why or why not? Appeal involves consideration of evidence.

CERTIFICATION

I/We hereby certify that a copy of the foregoing statement was executed and a copy served on:
Hon. William R. Harris, Special Judge, Logan Circuit Court, P. O. Box 262, Franklin, Kentucky 43134; Jim Nealy, Logan Circuit Court Courthouse, Russellville, Kentucky 42276, all this 25th day of July, 1994.

NOTE: Items 2 and 3 (above) require documents to be attached to this form for filing.



Signature) (Date) 7/25/94

Name: Louis M. Waller
Attorney pro se
Address: P. O. Box 32, 139 W. Fourth Street
Russellville, Kentucky 42276

The filing of a civil notice of appeal suspends the running of time for further steps in the appeal __ see CR 76.14 (14)

ATTACHMENT

This matter concerns remarks made to Special. Judge in preamble of legal memorandum regarding judge who had recused. Recusal was upon motion but the recusing judge proceeded with hearing after the motion was made. Recusing judge then permitted persons from the court-room present as observers to give un-sworn testimony; demeaned counsel; stated that counsel had permitted his client witness to give testimony prejudicial to her; made false statement. about customary practices in the Court; permitted a non-party to participate in the proceedings; permitted two lawyers to alternately cross-examine the witness-client; addressed racial slur to minister in court room; stated to counsel in open court "we're doing it to you. We're doing it to you man"; suggested strategy to counsel on the other side and in general departed from his judicial function in an apparent manner.

The actions of the judge with respect to whom. remarks were addressed came on the heels; of a case in which that same judge had permitted counsel on the other side to place large photographic blow-ups of pages from a log not in evidence before the jury on closing argument and when asked to admonish stated that the blow-ups were a fair inference from the evidence.

The actions of the judge with respect to whom the remarks were made did not come from ignorance, mistake or the heat of controversy but rather were art of customary practice and a belief that that judge was completely protected (being a close personal friend of the Chief. Justice of the Kentucky Supreme Court and knowing that under existing law he could act with impunity).

At hearing on the show cause order issued by the incoming judge counsel aid out in detail numerous instances of misconduct extending over a period of many years. Additional evidence was presented on subsequent motions.

No witness appeared to contradict the words and the incoming judge deemed the words alone the basis for a

finding a contempt and imposed a 30 day jail sentence and $499.OO fine. After commencing service of his sentence the new judge amended his contempt order including language of medical necessity without consulting appellant. That order was not amended notwithstanding explanation.

Appellant seeks to expand the law to provide for measurement of language used toward judges in terms of the context and to provide for findings of contempts by judges in the courts in which they preside. The remedy of appeal is no longer a viable alternative as the appellate courts can no longer afford relief within a reasonable time frame.

Free men will ever spit on tyrants - whether or not those tyrants wear robes.

WHEREFORE appellant will show this Court that the Contempt Judgment should be set aside and held for naught and that in lieu thereof appellant be awarded a medal for meritorious service to the profession, same to be awarded in an appropriately dignified ceremony by the Chief Justice of the Supreme Court of Kentucky with a simultaneous over-flight of marijuana transporting C-46's of Colombian registry.

Louis M. Waller

KENTUCKY BAR ASSOCIATION

Re: Inquiry Tribunal V. Louis M. Waller Esq.
KBA File No. 4508

ANSWER

Comes Louis M. Waller and answers the Inquiry Tribunal Complaint as follows:

1. THE CONDUCT complained of was not intended to disrupt a tribunal. The remarks made were in the preamble to a Special Judge by way of explaining. The judge about whom the remarks were made had recused and was not then in the case. If the tribunal was disrupted it was not intended. No comments were made or authorized to be made to the press. The proceedings in the case in which the remarks were made continued without interruption and the contempt proceedings (except for the initial hearing to which no member of the press was invited or authorized to be invited) were conducted in private.

2. THE MEANS were not used for the purpose of embarrassing, delaying or burdening a third person. They were made to call attention to a situation directly affecting the case under consideration. No person (not even the judge about whom the remarks was made) other than the incoming judge, is known to have found the language embarrassed, delayed or burdened a third person. It is the practice complained of - a practice which makes a mockery of the court process. To be repeatedly demeaned, to have a judge suggest that clients seek counsel elsewhere, to have a judge refuse to follow the law and do so blatantly, to have a judge address racial slurs to a black minister present in court in support of your client, to have a judge call you on matters in which he has a personal interest and suggest strategy, to have a judge have a lock on the local news media, to have your clients mistreated unfairly, - I follow the rules, judge no.

Yours truly has completed about 26 of his thirty days in jail, sat of a cold steel toilet under the gleeful eyes of cloddish jailers, and all because of words. I have enough sense to know that these words are not appropriate except in the most odious of circumstances.

The contempt finding is on appeal.
There is no rule I am aware of limiting speech under the circumstances When I entered law school no one ever suggested playing for 20 years against a stacked deck - perhaps I am in the wrong profession.

Respectfully submitted,
Louis M. Waller

Certificate

It is hereby certified that a true copy hereof was mailed to Barbara S. Rea Esq., Attorney, Kentucky Bar Association, 514 West Main Street, Frankfort, Kentucky 40601-1883, this August 3, 1994.

Louis M. Waller
Attorney and Counselor at Law
P. O. Box 32 Phone 726-2058
139 W. Fourth Street
Russellville, Kentucky 42276

November 3, 1994

Michael Troop Esq.
United State Attorney
10th Floor, Bank of Louisville Building,
510 W. Broadway
Louisville, Kentucky 40202

Re: Request for Grand Jury Investigation
Logan County, Kentucky

Dear Mr. Troop:

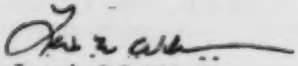
You are requested to convene a Federal Grand Jury to investigate - corruption by public officials and officers of the Court in Logan County, Kentucky, including the following: Hon. William G. Fuqua, Fred Greene Esq., J. Gran Clark Jr. Esq. present and past members of Logan Fiscal Court. The following non-officials should be included: R. L. Kemp, R. N. Kemp, Tom Kemp, Tom N. Kemp.

The evidence is included within the attached Composite Exhibit "A" filed in connection with a pending civil matter before Special Judge William Harris. I would appreciate if (assuming the facts justify my recommendation) you not interfere with the pending civil matter as I would like to see it proceed on its own merits (and hopefully cull out all of the criminal stuff before trial, but give this area any needed attention).

It would appear that there is misprision substantially affecting property and civil rights, bid-rigging, misuse of Federal Highway and other funds, tip-offs from State Officials on by-pass locations etc.

I will be pleased to assist in any way that I can should you so desire.

Very truly yours,

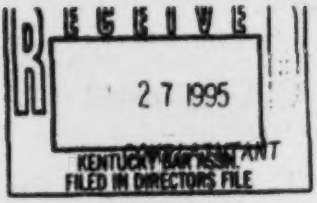


Louis M. Waller

CC: Chris Gorman Esq., Atorney General
Judicial Removal and Retirement Commission
(with Composite "A")
Kentucky Bar Association
Hon. Robert F. Stephens, Chief Justice,
Kentucky Supreme Court
Hon. William Harris, Special Judge, Logan Circuit Court

7/21/95

SUPREME COURT OF
KENTUCKY
KBA FILE 4505



KENTUCKY BAR ASSOCIATION

VS. MOTION TO RECONSIDER

* * * * * * * *

LOUIS M. WALLER, ESQ., RESPONDENT

Comes Respondent, pro se and for its motion to reconsider amendment of the Charge herein states as follows:

1. KBA'S Motion for Request to Amend Charge dated July 25, 2995 was filed without notice to respondent who reasonably anticipated reconsideration.
2. The stated reason for the motion is "In light of the opinion by the Court of Appeals and a review of the appellate record, the KBA would move that the charge be amended to include a count for a violation of SCR 3. 130-8.2."
3. Respondent is prepared to present evidence in support of his characterization.
4. If the law does not support the charge prior to amendment (arguments of KBA counsel on motion to reconsider charge) how can this tribunal seek to buttress its case by ex post facto conclusions without specifics?
5. Respondent is prepared to present evidence in support of his characterization.
6. The Court of Appeals decision in (95-SC-000586 on Motion for Discretionary Review) is contrary to the "clear and present danger" standard adopted by the Supreme Court of the United States. Wood v. Georgia, 370 U.S 375, 82 S. Ct. 1364, 8 L. Ed.2d. 569 (1962),

Bridges v. California, 314 U.S. 252, 273, 62 S. Ct. 190, 86, L. Ed.2d 192 (1941).

7. It is because respondent cares so much about the integrity of the judiciary that, for the first time since admission to the bar in 1957, he uses extreme language the substantial equivalent of the substantial threat that he sees to the administration of justice. The bar should expend its efforts balancing the equities and not assume that respondent is bent upon destroying the judiciary. Thirty days in jail is sufficient as a price to see justice administered fairly. If the remarks had been made about a judge long dead no question would be raised. The power and influence of the judge whose actions were criticized underlies the thirst for blood (as seen through the eyes of the patient).

WHEREFORE Respondent prays as in his earlier motion to reconsider.

Louis M. Waller
Attorney pro se
P. O. Box 32
620 W. Seventh Street
Russellville, KY 42276

Certificate

It is hereby certified that a true copy hereof was mailed to Jay R. Garrett Esq., Tribunal Attorney, 514 W. Main Street, Frankfort, Kentucky 40601-1883 this the 26th day of July, 1995.

7/28/95

SUPREME COURT OF KENTUCKY
KBA FILE 4505

KENTUCKY BAR ASSOCIATION COMPLAINTANT

VS. MOTION TO DISMISS

LOUIS M. WALLER ESQ. RESPONDENT

* * * * * * * * *

Comes respondent, pro se, and moves the Inquiry Tribunal to dismiss the within charge on the following grounds:

1. Respondent is advised, and therefore believes that the Governor of the Commonwealth of Kentucky has appointed the Hon. William G, Fuqua to the Kentucky Supreme Court, same occurring on or about July 28, 1995.
2. Respondent is advised, and therefore believes, that the said Hon. William G. Fuqua was recommended for appointment to the Kentucky Supreme Court by the Chief Justice of the Kentucky Supreme Court, Hon. Robert Stephens.
3. Respondent, as a member of the Kentucky Bar Association, is obliged to up-hold the dignity and reputation of the Hon. William G. Fuqua and those entrusting him with the judgeship of the Supreme Court. All other members of the bar and of this tribunal are also so obliged under Rules of the Supreme Court governing the practice of law.
4. Any person member of this bar who has the temerity to use the appellation giving rise to the charge herein is obviously deranged, a low-life, scum, lacks dignity and

harbors some nefarious design. He must have a personal axe to grind.

5. The person member of this bar cannot have a fair trial before this forum or in the Commonwealth of Kentucky as the bar - Supreme Court control proceedings.
6. Notwithstanding the foregoing all of the following facts are true:

a) Logan Circuit Court Civil Action No. 94-CI-00259 involves an unlawful taking of the property of black citizens of this Commonwealth under color of law and that endeavor was actively abetted by Hon. William G. Fuqua.

b) Hon. William G. Fuqua, after an appointment as guardian ad litem for minor children as part of highway enlargement project, ascertained that the property of those children bordered on a highway which is the same property involved in Civil Action No. 94-CI-00259. The source deed under which is the children owned property provided that the property could not be sold until the youngest child reach the age of 21 years. The said real property comprised all of the property on the west side of the roadway disputed in Case No. 94-CI-00259 and the only property in that litigation not owned by the defendants Yarbrough et al.

c) Hon. William G. Fuqua petitioned the Court for appointment as guardian for the said children and was appointed and filed reports and participated in litigation as guardian for the said children, which litigation involved the property.

d) During the time that Hon. William G. Fuqua was acting as guardian for the Collins children aforesaid (which time period commenced before and continued after he became circuit judge) the said Hon. William G. Fuqua participated in the real estate brokerage firm of Parrish and Fuqua, was active bank director and associated with R. L. Kemp and wife and R. N. Kemp and wife in Subdivision and real estate development. Through his

position with the Economic Development Commission for the County he was the interface of the County with Frankfort and undertook shepherding enlargement of Highway 68-80 (the disputed roadway was intended to be an access way to a by-pass when Highway 68-80 was enlarged). To the south of the disputed roadway is the Logan County airport which Hon. William G. Fuqua represented (in one instance he solicited bids for runway expansion), reported KAPCO (a corporation owned by his business partners the Kemps) as the only qualified and responsible bidder and the runway expansion was let to KAPCO without bidding. The entire $30,000.00 allotment from Barren River Area Development District was used to pay off the airport debt in 1978. The Kemps (first Tom then Corporation) were deeded the Collins property.

e) Under the circumstances of paragraph (d) above, the said Hon. William G. Fuqua acted improperly in not heeding the request of counsel that he recuse prior to the hearing on motion for temporary injunction - and acted improperly in issuing an exparte order prior to that hearing when counsel was available to be heard.

7. Is it unprofessional to react when you know the County to be under control of a judge or that he acts in concert with county officials to take your client's property? The rules of Court anticipate a level playing field and a disinterested judge. The election to judicial office is to serve justice - not to act as County Dictator. The Constitution of Kentucky (Article 1) guarantees citizens (lawyers also) "The right of freely communicating their thoughts and opinions." Plain speech serves the profession better than sacrosanct endorsement of platitudes.

8. When the contempt case (95-SC-000586 and 94-CA001845) was argued before the Court of Appeals the only thing close to criticism was a question as to why I did not simply go down into the coffee shop and make

the comment rather than putting it into the record. When the opinion comes out I am slandered by the statement that I "slandered" Judge Fuqua, when only facts were recited.

9. At this juncture I can presumably defend each and every thought which led to the characterization "ass hole" with all of the scum that goes with it. Respondent truly could care less what happens to Judge Fuqua and wishes him well and has no interest in slandering or libeling him whether or not truth exists but the cause is rightful and not personal and is directly connected to proper representation of clients who truly are being deprived of their rights granted by the constitutions and law. Now if I can persuade the United States Supreme to grant certiorari after you guys are through doing your number on me?

WHEREFORE, it having been shown that no fair trial can be had by this Forum, respondent respectfully moves for DISMISSAL of the charges against him.

Louis M. Waller
Attorney pro se
P. O. Box 32
620 W. Seventh Street
Russellville, Kentucky 42276

Certificate

It is hereby certified that a true copy hereof was mailed to Jay R. Garrett Esq., Tribunal Attorney, 514 W. Main Street, Frankfort, Kentucky 40601-1883, this July 28, 1995.

8/9/96

SUPREME COURT OF KENTUCKY
KBA FILE 4508

KENTUCKY BAR ASSOCIATION COMPLAINTANT

VS. ANSWER TO FIRST AMENDED COMPLAINT

LOUIS M. WALLER, ESQ. RESPONDENT

Comes respondent, pro se, and for Answer to the First Amended Complaint states:

1. Respondent repeats and reaffirms as in his original Answer and the motions pending and incorporates as part of his defense numbered paragraphs 4, 6, 7 and 8 of Response to the Motion to Reconsider the Respondent's Charge by KBA.
2. In his "Rulings from the Bench" Hon. William Harris (Civil Action No. 94-CI-00259, 6/28/94 p. 11, L14 states that respondent "believes that Judge Fuqua is corrupt" and "It's clear to the Court that he blames Judge Fuqua for all of the evils--every evil imaginable in Logan County." Judge Harris is not only entitled to his opinion but that opinion obviously is more credible than any actually held by respondent. If true it simply shows that opinions expressed are opinions genuinely held. If genuinely held their expression is less odious.
3. The new count applies to a statement known to be false (SCR 3.130-8.2 (a) or with reckless disregard. Commentary indicates it is directed toward the election process but how can the language be applicable to one who knows the statement to be true? Is it totally inconceivable that a judge can also be a lying, incompetent ass-hole or is the very expression an inconsistency in terms? Since the judges make the rules and judge compliance or non-compliance with them see

the bar member is forced to pay his dues and keep his mouth shut. Hardly the marks of a democratic institution and one premised upon fair play.

4. It is respondent's view that Hon. William G. Fuqua controls Logan County. If that statement is new or strange come over here and give opposition to anything significant - or talk to someone who has. You will enjoy the opportunity to please the powers who sit in judgment of your actions. Respondent once enjoyed the good graces of his majesty and the attendant special commissioner assignments and representation of the emperor's bank but he opposed the thing and does so today.

WHEREFORE, Respondent prays that the charge be dismissed and that the bar be directed to address the question of what investments and controls are compatible with the office of Judge.

Louis M. Waller
Attorney pro se
P. O. Box 32
620 W. Seventh Street
Russellville, KY 42276

Certificate

It is hereby certified that a true copy hereof was mailed to Jay R. Garrett, Counsel for the Complaintant, 514 West Main Street, Frankfort, Kentucky 40601 this the 9th day of August, 1995.

P. S. And so I place this message in a bottle and set it adrift on a sea of papers - hoping that someone of common sense will read it and ask about the kind of future we want for our children and whether or not the Bill Fuqua's of the judiciary should be exposed. My own methods have been unorthodox but techniques of controlling public opinion and property derived from military counter-intelligence are equally so. My prayer is that you measure reality not form - ask who owns WRUS Radio - who owns the Logan Leader-News Democrat - if not literally what messages are published and broadcast on public issues? Or is it too formidable a task and will you yourself have to forego a place at the trough? There is a better and happier way and - with due temerity I claim to have found it - it requires one to identify an ass hole when he sees one.

(2)

No. 96-838

Supreme Court, U.S.
FILED
DEC 23 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

LOUIS M. WALLER,

Petitioner,

v.

KENTUCKY BAR ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The Kentucky Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

JAY R. GARRETT
Counsel for Respondent
Deputy Bar Counsel
Kentucky Bar Association
514 West Main Street
Frankfort, Kentucky 40601-1883
502-564-3795

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

49 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether an attorney's due process rights were denied when no evidentiary hearing was held, where no facts were disputed, where the attorney admitted the conduct which occasioned the charge, and only questions of law were presented?

2. Does the First Amendment to the United States constitution protect an attorney from criticizing a judge personally when such comment undermines the public confidence in the judicial system?

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N.A.A.C.P. v. Button, 371 U.S. 415 (1963) 12, 13

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) 9

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OTHER SOURCES

Michigan Bar Journal, "The Ethical Boundaries of Civility", Joan P. Vestrand (February 1995) 14

CITATION OF THE OPINION DELIVERED BY THE COURTS BELOW

The opinion of the Supreme Court of Kentucky is *Kentucky Bar Association v. Louis M. Waller*, Ky., 929 S.W.2d 181 (1996). See Petition for Writ of Certiorari, Appendix "A", pages 24-29.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS SOUGHT TO BE INVOKED

Statutory provision conferring on the Supreme Court jurisdiction to review the judgment of the Supreme Court of Kentucky:

28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS AND REGULATIONS

FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

KENTUCKY SUPREME COURT RULE 3.130:

Kentucky Rules of Professional Conduct Rule 8.2 Judicial and Legal Officials

(A) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

KENTUCKY SUPREME COURT RULE 3.210:

Processing Cases of Default, Pleas of Guilt or Answers Raising Only Issues of Law

(1) If no answer is filed after a Respondent is notified, or an answer is filed admitting the charge, or, the answer raises only issues of law, the Tribunal shall order the record, together with such investigative evidence as may have been obtained to be submitted to the Board. If the answer raises issues of law, the Chairman of the House shall be notified by the Tribunal and he shall appoint counsel for the Association to file a brief within twenty days thereafter. After briefs are filed, or the time within which briefs may be filed has expired, the record and briefs shall be forwarded to the President for assignment to a member of the Board for a report.

STATEMENT OF THE CASE

In June 1994, Petitioner represented a client in a civil matter in the Logan County, Kentucky Circuit Court.

After the regular judge recused himself from hearing the case and a special judge was appointed, Petitioner filed a memorandum styled as "Legal Authorities Supporting the Motion to Dismiss" which contained the following introductory language: "Comes defendant, by counsel, and respectfully moves the Honorable Court, much better than that lying incompetent ass-hole it replaced if you graduated from the eighth grade. . . . "

On April 25, 1995, the Inquiry Tribunal[1] issued a charge against Petitioner alleging that he engaged in unethical and unprofessional conduct. Specifically Petitioner was charged with one count of violating Kentucky Supreme Court Rule (SCR) 3.130-3.5(c), the Kentucky Rules of Professional Conduct, for using disparaging language intended to disrupt the court; one count of violating SCR 3.130-4.4 for using language that served no purpose and was intended to embarrass the regular circuit court judge; and one count of violating SCR 3.130-3.4(e) when he used specific language in a document filed in the court record to describe the regular circuit judge who had recused, and thus knowingly and intentionally alluded to a matter not relevant to the cause

---

[1] The Inquiry Tribunal is a body appointed annually by the Chief Justice of the Kentucky Supreme Court pursuant to SCR 3.140, to dispose of complaints of lawyer misconduct. The Tribunal is composed of a former judge or justice of the Court of Justice, a former president of the Kentucky Bar Association (KBA) and a former Chair of the KBA House of Delegates. If the Inquiry Tribunal determines by a majority vote, that a charge of unprofessional conduct should be filed against an attorney, it shall prepare such charge stating the name and present or last known address of the attorney and the facts alleged to constitute unprofessional conduct.

under consideration by the Court or supported by admissible evidence.

Petitioner filed an answer to the charge, admitting that he had made the statements as charged but denied that his conduct was unethical.

The Inquiry Tribunal subsequently issued a First Amended Charge alleging that the conduct admitted violated SCR 3.130-8.2(a) for making an unfounded statement concerning the qualifications and integrity of a regular sitting judge who had recused in the particular case. Petitioner answered the First Amended Charge by again admitting that he made the statement as charged, but denying that his conduct was unethical.

Pursuant to SCR 3.210, Petitioner's answer was submitted to the Chair of the Inquiry Tribunal who determined that the answer raised only a question of law, and ordered that it be submitted directly to the Board of Governors of the Kentucky Bar Association for a determination whether the admitted conduct violated the Kentucky Rules of Professional Conduct, and if so, what sanction the Board would recommend to the Kentucky Supreme Court. Petitioner and Respondent filed briefs to the Kentucky Bar Association's Board of Governors, and neither party requested an oral argument. The Board considered the case on November 17, 1995, and thereafter issued its Opinion. The Board of Governors unanimously found Petitioner not guilty of violating SCR 3.130-3.5(c), SCR 3.130-4.4 and SCR 3.130-3.4(c). By unanimous vote, the Board determined that Petitioner's statements characterizing the Judge as a lying incompetent ass-hole violated SCR 3.130-8.2(a). The Board of Governors

recommended to the Kentucky Supreme Court that the Respondent be publicly reprimanded for his violation of SCR 3.130-8.2(a). Pursuant to precedent and rule, the Supreme Court of Kentucky is the final arbiter of the facts and law in every disciplinary case; the recommendation of the Board is advisory. *Kentucky Bar Association v. Jones*, Ky., 759 S.W.2d 61 (1988).

The entire record was filed with the Clerk of the Supreme Court of Kentucky on February 7, 1996. On April 25, 1996, the Supreme Court of Kentucky issued an order announcing its intention to review the case *de novo* and directed the Petitioner and the Respondent to file briefs. Each party filed the required brief; neither requested oral argument before the Court. On August 29, 1996, the Supreme Court of Kentucky rendered its opinion that the Petitioner was guilty of violating SCR 3.130-8.2(a), and ordered him suspended from the practice of law in the Commonwealth of Kentucky for a period of six (6) months. The Opinion of the Supreme Court of Kentucky is set forth in its entirety in the Petition for Writ of Certiorari, Appendix "A" pp. 24-29.

On September 3, 1996, Petitioner filed with the Supreme Court of Kentucky a Motion to Reconsider Opinion and Order entered August 29, 1996 and a Motion to Stay Order Pending Ruling on Motion to Reconsider. On September 26, 1996, the Supreme Court of Kentucky denied the Respondent's Motion to Reconsider the Opinion and Order and granted, in part, his Motion to Stay Order Pending the Ruling on Motion to Reconsider. This did not change the sanction, it merely stayed his suspension until September 26, 1996. A copy of Kentucky

Supreme Court Rules 3.130-8.2 and 3.140-3.380 is attached as Appendix "A".

ARGUMENT

I. WHETHER AN ATTORNEY'S DUE PROCESS RIGHTS WERE DENIED WHEN NO EVIDENTIARY HEARING WAS HELD, WHERE NO FACTS WERE DISPUTED, WHERE THE ATTORNEY ADMITTED THE CONDUCT WHICH OCCASIONED THE CHARGE, AND ONLY QUESTIONS OF LAW WERE PRESENTED

The facts of this case are clearly stated in Opinion and Order of the Supreme Court of Kentucky set forth in full in the Petition for Writ of Certiorari, Appendix (A), pages 24-29, and need not be recited here.

Petitioner asserts that he was denied his right to due process guaranteed by the Fourteenth Amendment to the United States Constitution because no evidentiary hearing was held in his disciplinary case. Respondent does not concede the application of the Fourteenth Amendment to Kentucky's lawyer disciplinary process, but will respond to the Petitioner's argument since due process, i.e. notice and an opportunity to be heard, was satisfied by these proceedings. Pursuant to SCR 3.210, the Chair of the Inquiry Tribunal reviewed the charge, the First Amended Charge, and the Petitioner's Answers to the Charge and the First Amended Charge and determined that no questions of fact were raised which would require an evidentiary hearing. In his answers, the Petitioner

admitted the factual allegations of the charge of professional misconduct. Where no facts are controverted, there is no need to hold an evidentiary hearing before the Trial Commissioner. Petitioner did not deny making the subject statements in the memorandum about the circuit judge. No facts were in dispute. The Chair of the Inquiry Tribunal was justified in finding, and compelled to find, that only legal issues were presented for decision in the case and was authorized by Rules of Kentucky Supreme Court to order the case submitted directly to the Board for determination whether the admitted conduct constituted a violation of the applicable rules of Professional Conduct. The Petitioner never contested the Chair's decision that his answer only raised an issue of law, and he never requested an evidentiary hearing or an oral argument. Petitioner therefore waived his opportunity for hearing before a Trial Commissioner.[2]

The waiver of an evidentiary hearing does not deny the respondent in a disciplinary case notice and an

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[2] Pursuant to SCR 3.210, if the answer raises only a question of law, the Chair of the Inquiry Tribunal shall order the record, together with such investigative evidence as may have been obtained to be submitted to the Board of Governors. The Chair shall notify the Chair of the KBA House of Delegates to appoint counsel for the KBA to file a brief within twenty days, and the Respondent may file a brief within twenty days thereafter. If the answer raises a question of fact, pursuant to SCR 3.230, the Chair of the Inquiry Tribunal shall notify the Chair of the House of Delegates in order that he may appoint an attorney for the KBA and a member of the House of Delegates to act as a Trial Commissioner. The Trial Commissioner shall fix the time and place for an evidentiary hearing and determine and regulate the order of proceedings at the hearing.

opportunity to be heard. Under well settled Kentucky law, an evidentiary hearing is required only if there are facts in controversy. In *Kentucky Bar Association v. Ricketts*, Ky., 599 S.W.2d 454, at 455-456 (1980), the Kentucky Supreme Court held:

> The procedure for disciplining an attorney is clear in requiring an evidentiary hearing if a respondent raises a question of fact. SCR 3.210(1). If there are only questions of law, the matter is sent by the Inquiry Tribunal to the Board of Governors. As we said, the formal answer of the respondent to the charge filed by the Inquiry Tribunal admitted the factual allegations of the charge. Further, Respondent did not request an evidentiary hearing before either the Inquiry Tribunal or the Board of Governors. Under these circumstances, and familiar principles of law, respondent had a fair hearing which satisfied the requirements of due process.

Secondly, Petitioner had an opportunity to be heard on the legal issues presented when he filed a brief to the Board of Governors and when he filed a brief to the Kentucky Supreme Court. Pursuant to SCR 3.330, a Trial Commissioner is required to find the facts established by substantial evidence, while the Board of Governors of the Kentucky Bar Association is required to conclude, as a matter of law, whether the facts established or admitted constitute a violation of the applicable standards of professional conduct. The Board of Governors then makes a recommendation of guilt or innocence and, if guilty, recommends an appropriate sanction to the Kentucky Supreme Court. When the case was presented to the Board of Governors, Petitioner filed his brief. After his

case was referred to the Kentucky Supreme Court, and the Court noticed review on its own motion, pursuant to SCR 3.370(8), Petitioner filed a brief to the Court as well. Petitioner was on notice by the Chair and First Amended Charge and was given the opportunity to explain and defend his case to the Board of Governors and to the Kentucky Supreme Court. He took full advantage of this opportunity by filing his brief, there was no denial of due process. In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, at 654-655 (1985), this Court held:

> Appellant does not contend that he was afforded no opportunity to respond to the Board's recommendation; indeed, the Ohio rules appear to provide ample opportunity for response to Board recommendations, and it appears that Appellant availed himself of that opportunity. *The notice and opportunity to respond afforded appellant are sufficient to satisfy the demands of due process.* (Emphasis Added).

II. DOES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION PROTECT AN ATTORNEY FROM CRITICIZING A JUDGE PERSONALLY WHEN SUCH COMMENT UNDERMINES THE PUBLIC CONFIDENCE IN THE JUDICIAL SYSTEM?

In the course of representing a client in a civil matter, Petitioner filed a pleading in open court in which he referred to the regular sitting judge, who had already recused, as a "lying, incompetent ass-hole." Petitioner argues that his statement is protected under state and federal constitutional guarantees of free speech. An attorney, both as a citizen and as an officer of the court, has a

constitutional right to criticize in properly respectful terms and through legitimate means the acts of courts and judges. A person does not forfeit his right to freedom of speech when he becomes an attorney at law and the Kentucky Bar Association through a disciplinary proceeding does not seek or desire to inhibit or restrict unduly Petitioner's exercise of his right to freedom of speech. However, this guarantee does not mean that an attorney may indulge in unfounded and offensive criticism of the judges personally. Unlike the ordinary citizen, every attorney has an added responsibility to the court for any abuse of his ethical duties as an officer of the court. He must abide by the Kentucky Rules of Professional Conduct that became effective on January 1, 1990 and are found in the Kentucky Supreme Court Rule (SCR) 3.130. SCR 3.130-8.2(a) provides that "a lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or a candidate for election or appointment to judicial or legal office."

The Kentucky Supreme Court has previously balanced the interests of an attorney in the exercise of his first amendment rights with his duty to maintain respect for the judicial system. There are limits to freedom of speech. In the case of *Kentucky State Bar Association v. Lewis*, Ky., 282 S.W.2d 321, at 326 (1955), the Supreme Court of Kentucky held:

> Freedom of speech is not a license. It is a right or a privilege constitutionally guaranteed, but he who uses it as a license to degrade another does so at his peril. . . . Of course any attorney,

> as well as any other citizen, has the right to criticize the courts in their decisions but the publication of false and scurrilous matters subjects them to disciplinary action. Thatcher v. United States, 6 Cir., 212 F. 801; State ex rel. Dabney v. Breckenridge, supra, 126 Okl. 86, 258 P. 744, 53 A.L.R. 1239; Snyder's Case, 301 Pa. 276, 152 A. 33, 76 A.L.R. 666.

This Court has examined the application of the First Amendment to lawyers' criticism of judges and the judicial system in *In re Sawyer*, 360 U.S. 622 (1959). Sawyer represented a number of defendants who had been indicted and were being tried in the United States District Court for conspiracy under the Smith Act. Sawyer was charged with two counts of unethical conduct, one of which involved a public speech she made before a group of lay people. Sawyer spoke of the "horrible and shocking" things going on at the trial, the impossibility of a fair trial in a Smith Act Case, and the necessity of ignoring the rules of evidence if the government were to prove its case.

This Court held that Sawyer's speech could not subject her to discipline because it did *not* directly impugn the integrity and impartiality of the trial court but rather merely constituted permissible criticism of the Smith Act cases in general. Her references to the pending trial were deemed not to reflect on the trial judge personally nor his conduct of the trial. At page 635 of the majority opinion the Court stated:

> Even if some passages can be found which go so far as to imply that Judge Wiig was taking an erroneous view of the law . . . we think there was still nothing in the speech warranting the

> findings (that Sawyer had engaged in unethical conduct and should be disciplined). If Judge Wiig was said to be wrong on his law, it is no matter; appellate courts and law reviews say that of judges daily, and it imputes no disgrace. Dissenting opinions in our reports are apt to make petitioner's speech look like tame stuff indeed. *Petitioner did not say Judge Wiig was corrupt or venal or stupid or incompetent.* The public attribution of honest error to the judiciary is not cause for professional discipline in this country. See Re Ades (DC Md) 6 F Supp 467, 481. *In re Sawyer,* at 635. (Emphasis added)

Mr. Justice Stewart concurred with the majority's holding that the charge against Sawyer had not been proven but he went on to discuss the issue of free speech under the First Amendment:

> A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow the calling must conform to those standards.
>
> Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech. *In re Sawyer,* at 646-647.

The Kentucky Supreme Court in *Kentucky Bar Association v. Heleringer,* Ky., 602 S.W.2d 165 (1980), cert. denied, 449 U.S. 1101 (1981), relied on the holding in the *Sawyer* case when it held that a lawyer may criticize the state of the law, trials, or a judge's decision with impunity

because the expression of those opinions is constitutionally protected. However, pursuant to *Sawyer* a lawyer's comments cannot attack personally a particular court or judge and still be deemed protected speech. Here, Petitioner's comments were aimed directly at the judge who was not even in the case any longer. He was not criticizing the judge's decision or the law. Respondent stated that the judge was a "lying, incompetent ass-hole." Clearly this language constitutes a personal attack, is impermissible, and does not enjoy the protection of the First Amendment. The Kentucky Supreme Court, in *Heleringer,* relying on precedent, stated:

> Our system of justice rests upon the mutual regard of the Bench and Bar. *Matter of Frerichs,* 238 N.W. 2d 764-766 (1976). In the case of a lawyer an abuse of the right of free speech may be some index of his character or fitness to be a lawyer. *In re Lacey,* 283 N.W. 2d 250, 252 (1979) quoting *In re Gorsuch,* 76 S.D. 191, 75 N.W. 2d 644, 57 A.L.R. 2d 1355 (1956). Nor does free speech give a lawyer the right to openly denigrate the court in the eyes of the public. *In re Raggio,* 87 Nev. 369, 371, 387 P. 2d 499, 500 (1971). *Heleringer,* at 168.

It has been consistently held that only a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can justify limiting First Amendment freedoms. *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963). A lawyer's verbal abuse of a judge on a personal level leads to loss of public confidence in our system of justice. *Bradley v. Fisher,* 80 U.S. 335 (1872), *Kentucky State Bar Association v. Lewis,* supra, *Kentucky Bar Association v. Heleringer,* supra.

The state has a significant interest in maintaining the reputation and dignity of the courts and the legal profession. In balancing the competing interests at stake, it is generally recognized that the individual's interest is outweighed by the state's justifications for restricting the expression. As stated in Justice Stewart's concurring opinion in *Sawyer,* a lawyer cannot invoke the constitutional right of free speech to immunize himself from discipline for proven unethical conduct. *See,* Joan P. Vestrand, "The Ethical Boundaries of Civility", *Michigan Bar Journal* (February 1995) pp. 170-172.

The comments about the judge made by the Petitioner are unprotected speech in the form of a personal attack. Petitioner has never denied that he made the statements that the circuit judge was "a lying, incompetent ass-hole," in a legal memorandum styled "Legal Authorities Supporting the Motion to Dismiss." Respondent submits that Petitioner's irresponsible actions serve only to undermine public confidence in the integrity of the judicial process. The language also failed to accomplish his goal of having the motion to dismiss granted.

Respondent asserts that *Sawyer* is directly on point and supports the decision of the Board of Governors of the Kentucky Bar Association and the Opinion of the Supreme Court of Kentucky. The Respondent notes the Opinion of the Supreme Court of Kentucky cites and discusses *Sawyer.* Respondent is mindful of the first amendment right of a lawyer to criticize the state of the law or even to state that the judge has not properly applied the law in a particular case. Respondent is also aware that the Kentucky Constitution, as amended in

1976, provides for a state Retirement and Removal Commission which can consider alleged improper conduct by a member of the judiciary and take appropriate action against the judge in the public interest. The Petitioner failed to utilize the appropriate forum to register his protest against the rulings of a judge for whom he sought and received recusal. Instead Petitioner chose to attack the judge personally in scurrilous language in a legal document filed in open court.

There is no doubt in the present case that Petitioner publicly stated that a circuit judge was "a lying incompetent ass-hole." The Supreme Court of Kentucky specifically found that Petitioner's statement was unwarranted. Petitioner's speech was not only degrading to the judge, but is prejudicial to the administration of justice. Both the Supreme Court of Kentucky and the Board of Governors of the Kentucky Bar Association, after considering the record and the applicable case law, found that the Respondent's conduct violated the Kentucky Rules of Professional Conduct and disciplined him. The decision was just and fair. There are no justifiable reasons for granting the Writ of Certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A
RULES OF THE SUPREME COURT OF KENTUCKY

RULE 8.2 JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the code of judicial conduct.

Comment

(1) Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

(2) When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

(3) To maintain the fair and independent administration of justice, lawyers are encouraged to continue

traditional efforts to defend judges and courts unjustly criticized.

RULE 8.3 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) state or imply an ability to influence improperly a government agency or official; or

(e) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

(1) Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to

fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

(2) A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

(3) Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

RULE 8.4 JURISDICTION

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

Comment

(1) In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5.

(2) If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

(3) Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal, where the general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.

SCR 3.140 APPOINTMENT OF INQUIRY TRIBUNAL

Annually, the Chief Justice shall appoint a former justice or former judge of the Court of Justice, a past-president of the Association, and a former chairman of the House to serve as members of an Inquiry Tribunal. One member shall be designated chairman and each shall possess the qualifications and appropriate powers of a circuit judge. The Tribunal may confer at such times as

may be necessary to promptly dispose of all complaints referred to it pursuant to Rule 3.170. [Amended effective January 1, 1978; April 1, 1982; September 15, 1990.]

SCR 3.150 PROCEEDINGS NOT PUBLIC; EXCEPTIONS*

(1) Subject to the following exceptions, nothing connected with a disciplinary case shall be made public unless so ordered by the Court:

(a) Upon request of the Retirement and Removal Commission, the Director shall make available to the Commission any of its records pertinent to an investigation by the Commission.

(b) Upon request of the Trustees of the Clients' Security Fund, the Director shall make available to the Trustees any records pertinent to the investigation of an application for relief under consideration by the Trustees and said records shall not be made public by the Trustees unless so ordered by the Court.

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* Publisher's Note: On April 27, 1981, the Supreme Court of Kentucky entered the following order: "Effective July 1, 1981, except for those proceedings in which this Court determines either that a private reprimand or no disciplinary action whatsoever is proper and which therefore must remain confidential, in such other matters considered by this Court under SCR 3.370 and SCR4.290 which by SCR 3.150 and SCR 4.120 are to be kept confidential until otherwise ordered by this Court, the entire record in the proceeding shall be considered public at such time as this Court's opinion becomes final under CR 76.30."

(c) An attorney against whom any complaint or charge is pending may elect to discuss his case with others to the extent he deems it appropriate consistent with the defense of his case and the practice of his profession.

(d) Upon a final adjudication of any complaint or charge brought against an attorney, the attorney may, if the complaint or charge has been fully dismissed, reveal this fact.

(2) The Inquiry Tribunal may refer the name of a member who has a complaint filed against him to the Association's Lawyers Helping Lawyers Committee for possible assistance to the member without reference to the source or subject matter of the complaint, provided such referral will not delay the disposition of the complaint under these Rules.

[Amended effective January 1, 1980; April 1, 1982; October 1, 1982; January 1, 1986; January 1, 1987.]

SCR 3.160 INITIATION OF DISCIPLINARY CASES

(1) Any complaint against an attorney for unprofessional conduct shall be reduced to a sworn written statement and shall be filed with the Director who shall promptly notify the attorney by certified mail of the complaint and inform him that he has fifteen days to acknowledge receipt of the complaint or respond to the merits.

(2) Notwithstanding the provisions of paragraph (1), when it comes to the attention of the tribunal from any source that an attorney may have engaged in

unprofessional conduct, the tribunal may initiate and conduct an investigation, and if it believes from its investigation that there is sufficient evidence to justify its filing a complaint against the attorney it may file such a complaint.

(3) Notwithstanding the provisions of paragraph (1), if the Director deems any written complaint against a member frivolous on its face, he may submit it to the chairman of the Inquiry Tribunal who may decline, without investigation, to entertain it and may authorize the Director to return the complaint to the complaining party with a letter of explanation.

(4) Neither the Kentucky Bar Association nor its officers, agents, delegates or members shall be liable to any member of the bar nor to any other person charged or investigated by said association, its officers, agents or delegates, for any damages incident to such investigation or any complaint, charge, prosecution, proceeding or trial.

[Amended effective January 1, 1978; July 1, 1979; January 13, 1986.]

SCR 3.165 TEMPORARY SUSPENSION BY THE SUPREME COURT

On petition of the Inquiry Tribunal, authorized by its Chair, and supported by an affidavit or certified copy of a judgment, an attorney may be temporarily suspended from the practice of law or placed on conditional probation by order of the Court provided:

A. It appears that reasonable cause exists to believe that an attorney is or has been misappropriating funds held for others to that attorney's own use or has been otherwise improperly dealing with said funds and reasonable cause exists to believe that unless such an order is issued, a real and present danger exists to the public.

Any such order of temporary probation or suspension which restricts the attorney in dealing with said funds shall, when served on any bank maintaining any account upon which said attorney may make withdrawals, serve as an injunction to prevent said bank from making further payment from such account or accounts on any obligation except in accordance with restrictions imposed by the Court, and shall direct such bank not to disclose (except to those entitled to withdraw from the account or accounts or to receive payment of such obligation, or upon the express written permission of at least one of such persons as to each such account or obligation) that such order has been received or the contents thereof. Any fees tendered to such attorney thereafter shall be deposited in a trust fund from which withdrawals may be made only in accordance with restrictions imposed by the Court. The Court may appoint a trustee to receive, transfer, or disburse any funds that are in the possession or are under the control of the attorney if the funds came into the attorney's possession from the attorney's clients or from third parties in the course of the practice of law. The Court may require the trustee to render an accounting of said funds to the Court and to furnish a copy of the accounting to the director; or

B. An attorney has been convicted of a Class A misdemeanor and it appears from the record of such

conviction that said attorney has so acted as to put in grave issue whether he or she has the moral fitness to continue to practice law; or

C. It appears that reasonable cause exists to believe that an attorney is mentally disabled or is addicted to intoxicants or drugs and reasonable cause exists to believe the attorney does not have the physical or mental fitness to continue to practice law. If the attorney denies a mental disability or denies an addiction to intoxicants or drugs, the Court may order the attorney to submit to a physical or mental examination by a physician appointed by the Court. The examining physician shall file with the Clerk of the Court a detailed written report setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. The clerk of the Court shall furnish a copy of the examining physician's entire report to the attorney and to the director. The Court may order the attorney to produce to the Court and to the director any relevant medical or psychiatric records evidencing prior or ongoing treatment for mental disability or addiction to drugs.

Upon receipt of a petition of the Inquiry Tribunal the Court shall issue an order against the attorney to show cause returnable within twenty days of the issuance of such order. The Court may impose temporary conditions of probation on said attorney or temporarily suspend said attorney or both.

The attorney may for good cause request dissolution or amendment of any such temporary order by petition filed with the Court, a copy of which will be served on

the director. The Court may refer such petition for dissolution to a person who possesses the qualifications of a trial commissioner under Rule 3.230 who shall act as a special commissioner for immediate hearing. The special commissioner shall hear such petition forthwith and submit his or her report and recommendations to the Court with utmost speed consistent with due process. Upon receipt of the foregoing report, the Court may modify its order if deemed appropriate until final disposition of all pending disciplinary charges against said attorney.

Within twenty (20) days from the date of the entry of the order of temporary suspension, the attorney shall notify all clients in writing of said attorney's inability to continue to represent them and shall furnish copies of all such letters of notice to the director.

[Adopted effective January 1, 1978, amended effective May 1, 1980; November 15, 1991; October 1, 1994.]

SCR 3.166 AUTOMATIC SUSPENSION AFTER CONVICTION OF A FELONY

(1) Any member of the Kentucky Bar Association who pleads guilty or is convicted by a judge or jury of a felony as defined in KRS 500.080 shall be automatically suspended from the practice of law in this Commonwealth. The suspension shall take effect automatically beginning on the day following the plea of guilty or finding of guilt by a judge or jury or upon the entry of judgment whichever occurs first. The suspension under this rule shall remain in effect until dissolved or superseded by order of the Court. Within thirty (30) days of the plea of guilty or finding of guilt by a judge or jury or

entry of judgment whichever occurs first, the suspended attorney may file a motion with the clerk of the Supreme Court of Kentucky setting forth any grounds which the attorney believes justify dissolution or modification of the suspension.

(2) The attorney prosecuting the case to a plea of guilty, conviction by judge or jury or entry of judgment, whichever occurs first, shall immediately notify the director of the Kentucky Bar Association and the clerk of the Supreme Court that such plea, finding or entry of judgment has been made.

(3) The suspended attorney shall serve a copy of any motion filed under paragraph (1) above on the Bar's counsel by mailing a copy to 514 West Main Street, Frankfort, Kentucky 40601. The Bar's counsel shall file a response to the suspended attorney's motion within twenty (20) days of receipt of the motion.

(4) Any attorney suspended under this rule shall notify all clients in writing of the attorney's inability to continue to represent them and shall furnish copies of all such letters to the Director. These letters shall be mailed to the client within ten (10) days after the plea of guilty, conviction by judge or jury, or entry of judgment has been made. The attorney shall make arrangements to return all active files to the client or new counsel and shall return all unearned attorney fees and client property to the client and shall advise the director of such arrangements within the same ten (10) day period.

(5) Disciplinary proceedings against such attorney shall be initiated by the Inquiry Tribunal pursuant to SCR

3.160, unless already begun or unless the suspended attorney resigns under terms of disbarment.

[Adopted effective October 1, 1994.]

SCR 3.170 PROCESSING DISCIPLINARY CASES

Upon the expiration of fifteen days, or receipt of response, the Director shall refer the matter together with such investigative evidence as may have been obtained, to the Tribunal to determine whether the complaint should be dismissed or file a charge.

SCR 3.180 INVESTIGATIONS AND TRIALS TO BE PROMPT; SUBPOENA POWER

(1) All investigations and the trial of all disciplinary cases shall be begun, prosecuted and completed as promptly as the ends of justice will permit. Neither the unwillingness of the complainant to prosecute, nor an offer of settlement, compromise or restitution shall delay the investigation, trial or report to the Board.

(2) Proceedings may be deferred by the Tribunal if there is pending civil or criminal litigation directly involving the Respondent or proposed Respondent involving substantially similar material allegations to that or those in the disciplinary proceedings, provided, however, that the respondent-attorney proceeds with reasonable dispatch to insure the prompt disposition of the pending litigation.

(3) Upon application of the Director to the Tribunal and after a hearing of which respondent is given at least five days' notice, for good cause shown the Tribunal may

authorize the Director to issue a subpoena to a respondent, or any other person or legal entity to produce to the Director any evidence deemed by the Tribunal to be material to the investigation of a complaint. The person or entity so subpoenaed will not divulge, except to his own attorney, that such a subpoena has been served nor what evidence is sought or obtained. The respondent may be present at the time the evidence or material is examined or obtained by the Director and will be furnished copies of all documents obtained.

[Amended effective January 1, 1978; April 1, 1982.]

SCR 3.185 INFORMAL ADMONITORY PROCEDURE

After a complaint against an attorney for unprofessional conduct is investigated and a response filed, the Tribunal may direct a private admonition to the attorney where the acts or course of conduct complained of are shown to be of a minor ethical or technical nature. The attorney so admonished may, within 20 days from the date of the admonition, answer and request that the complaint be treated as if a charge had been filed against him as is provided by Rule 3.190; whereupon the issues shall be processed under the applicable rules.

[Adopted effective June 14, 1972; amended effective January 1, 1978.]

SCR 3.190 CHARGES; FORM; BY WHOM AND WHERE FILED

If the Tribunal determines, by a majority vote, that a charge should be filed, it shall prepare such charge stating the name and present, or last known, address of the attorney and facts alleged to constitute unprofessional conduct. The charge shall be signed by a member of the Tribunal and filed in the office of the Director.

SCR 3.200 NOTICE OF FILING CHARGES; TIME TO ANSWER

Upon the filing of a charge, the Director shall furnish the respondent with a copy by certified mail, return receipt requested, to his last known address, and if none is known subsequent thereto, to his last known bar roster address, and notify him that he must within twenty (20) days after receipt of the notice file his answer and three (3) copies with the Director for transmittal to the Inquiry Tribunal.

[Amended effective January 1, 1978.]

SCR 3.210 PROCESSING CASES OF DEFAULT, PLEAS OF GUILT OR ANSWERS RAISING ONLY ISSUES OF LAW

(1) If no answer is filed after a Respondent is notified, or an answer is filed admitting the charge, or, the answer raises only issues of law, the Tribunal shall order the record, together with such investigative evidence as may have been obtained to be submitted to the Board. If the answer raises issues of law, the Chairman of the House shall be notified by the Tribunal and he shall

appoint counsel for the Association to file a brief within twenty days and the Respondent may file a brief within twenty days thereafter. After briefs are filed, or the time within which briefs may be filed has expired, the record and briefs shall be forwarded to the President for assignment to a member of the Board for a report.

(2) The Board, by a vote of a majority of the Board present and voting, may remand the entire record to the Chairman of the House of Delegates for an evidentiary hearing on points specified in the Order of Remand. Upon such remand, the Chairman shall follow the procedure which appoints a trial commissioner as provided in Rule 3.230 et seq.

[Amended effective January 1, 1978.]

SCR 3.220 WHEN CHARGE SHALL NOT BE TAKEN AS CONFESSED

No charge against a respondent shall be taken as confessed when the respondent shall have been constructively summoned under Rule 3.270, unless the report of the respondent's appointed counsel states that he has caused the respondent to be notified of the nature and pendency of the charge.

[Amended effective January 1, 1978.]

SCR 3.230 PROCEDURE WHEN ANSWER RAISES ISSUES OF FACT

If the answer raises any issue of fact, the Inquiry Tribunal shall notify the Chairman of the House in order

that he may appoint an attorney to represent the Association, and appoint a member of the House to act as Trial Commissioner who will be so commissioned by the Chief Justice. The Trial Commissioner shall have been admitted to practice law for a minimum of five (5) years and shall reside in a different Supreme Court District from that of the respondent. The Director shall immediately notify the Trial Commissioner of his appointment and provide him with a copy of the pleadings.

[Amended effective January 1, 1978; January 1, 1987.]

SCR 3.240 NOTICE OF APPOINTMENT OF TRIAL COMMISSIONER AND HEARING

(1) Upon the appointment of a Trial Commissioner the Director shall notify the parties of his name and address. The Trial Commissioner shall fix the time and place of the hearing and the Director shall give notice thereof to the parties. Such hearing shall be not less than twenty (20) days after the date of the notice.

(2) The Trial Commissioner may convene a pretrial conference which shall demand the appearance of counsel representing the respective parties.

[Amended effective January 1, 1978.]

SCR 3.250 CHALLENGE TO QUALIFICATIONS OF TRIAL COMMISSIONER

Any time, not later than ten (10) days before the date set for hearing the respondent may, by motion, challenge for cause the Trial Commissioner. If the challenge is such as might disqualify a circuit judge, the Chairman of the

House shall relieve the challenged member and immediately fill the vacancy.

[Amended effective January 1, 1978.]

SCR 3.260 JOINDER AND CONSOLIDATION

(1) Any number of acts or omissions, and any number of separate and distinct transactions, alleged to constitute unprofessional conduct on the part of an attorney may be alleged in a single charge in separate counts. Separate charges may, by order of the Tribunal be consolidated and tried as a single disciplinary case.

(2) A charge may be filed against two or more attorneys if based on the same or related state of facts and separate charges against two or more attorneys based upon the same or related state of facts may, by order of the Tribunal, be consolidated and tried as a single disciplinary proceeding. Where two or more attorneys are proceeded against in the same proceeding the Trial Commissioner shall make a separate report to the Board as to each.

[Amended effective January 1, 1978.]

SCR 3.270 ABSENT RESPONDENTS; APPOINTMENT OF ATTORNEY

If the copy of the charge and notification, mailed to the respondent as required by Rule 3.200, is undelivered and returned to the Director, the Chairman shall, by order, appoint an attorney for the respondent. The Director shall furnish such attorney copies of the order appointing him to represent the respondent, the charge,

and the notification. It shall be the duty of an attorney so appointed to exercise reasonable diligence to notify the respondent personally or by mail of the nature and pendency of the charge against him. Not less than thirty days nor more than fifty days after his appointment, the attorney appointed for the respondent shall file a report stating what efforts he has made to locate and notify the respondent and whether the respondent has been apprised of the charge. If the report of the appointed attorney states that he has caused the respondent to be notified of the nature and pendency of the charge, no further duty shall be required of the attorney. If the report does not so state, it shall be the further duty of the appointed attorney to attend the hearing before the Trial Commissioner and thereat to represent the respondent, however, he shall not be required to make a factual investigation of the charge. A respondent for whom an attorney is appointed, as herein provided, shall be deemed to have been constructively summoned on the thirtieth day after the date of the order appointing his attorney. He may file an answer within twenty days after the date on which he shall have been deemed to have been constructively summoned.

[Amended effective January 1, 1978.]

SCR 3.280 PLEADINGS AND PRELIMINARY MOTIONS

There shall be a charge and answer and, when permitted by the Trial Commissioner, a reply and such amendments to pleadings as may be required to serve the ends of justice. Averments in an answer or a response

shall be taken as denied or avoided. No preliminary motions may be filed except:

(a) For a more definite statement of the charge or answer.

(b) Challenging the qualifications of the Trial Committee as provided by Rule 3.250.

[Amended effective January 1, 1978.]

SCR 3.328 MOTION TO RECONSIDER OR DISMISS A CHARGE

Prior to the evidentiary hearing before the Trial Commissioner, either the Respondent or counsel for the Association may file a motion with the Inquiry Tribunal to reconsider or dismiss a charge. The motion shall be verified and shall state specifically the reasons why the matter should be reconsidered or dismissed and may be accompanied by supporting affidavits and exhibits, if any. the motion shall be filed in the office of the Director under Rule 3.290. Upon such reconsideration, the Inquiry Tribunal may dismiss a charge it has previously issued, amend a charge, withdraw a charge and instead issue a private admonishment under Rule 3.185, or deny the motion and direct the Trial Commissioner to proceed with the hearing.

[Adopted effective January 1, 1988.]

SCR 3.290 FILING AND PROCESSING OF PLEADINGS AND OTHER PAPERS

Promptly after a charge is filed all further pleadings, notices, motions, orders, and briefs shall be sent to the

Director, who shall file the original and forward one copy to the Trial Commissioner and counsel of record. All other reports, inquiries, letters, letters of transmittal, and other communications shall be sent to, and processed by the Director. No such paper or copy thereof shall be sent by, or on behalf of any party to the Court, the Board, the Trial Commissioner, Tribunal, or any member thereof.

[Amended effective January 1, 1978.]

SCR 3.300 RIGHTS OF RESPONDENT AGAINST WHOM A CHARGE HAS BEEN FILED

The respondent against whom a charge has been filed shall have the right to be represented by counsel. If the Tribunal finds the answer to the charge raises issues of fact, the respondent shall be entitled to a hearing before a Trial Commissioner. He shall have all the rights secured to a party by the Rules of Civil Procedure with respect to the introduction of evidence, the right to compel the attendance of witnesses; and the production of books, papers and documents or other writings except those contained in the investigative file of the association. He shall have the right to an oral argument or to file a brief before the Trial Commissioner. He shall be afforded a full opportunity to remain silent, to defend himself by the introduction of evidence and to cross-examine witnesses called against him. If the respondent be unable to employ counsel, the Chairman, upon written request in affidavit form, made within twenty days after service of the charges, shall appoint counsel for the respondent.

[Amended effective January 1, 1978; April 1, 1982.]

SCR 3.320 PROCEDURE WHERE AN ATTORNEY HAS BEEN CONVICTED OF A MISDEMEANOR OR A FELONY

When any member of the Association has been convicted of a felony or class "A" misdemeanor a copy of the judgment shall be filed with the Director for action under Rule 3.160. The Director shall submit copies of the judgment to the Tribunal who may take action under Rule 3.165.

[Amended effective January 1, 1978.]

SCR 3.330 ORDER OF PROCEEDINGS AND BURDEN OF PROOF

The Trial Commissioner shall determine and regulate the order of proceedings at the hearing. Upon the application of a party or upon direction of the Trial Commissioner the Director shall issue subpoenas for the attendance of witnesses or the production of evidence. The burden of proof shall rest upon the Association in a disciplinary proceeding and the facts must be proven by substantial evidence. In reinstatement hearings the burden shall rest upon the applicant. Before submission the Trial Commissioner may direct such oral argument as it deems appropriate and receive briefs from all parties on such terms as it may impose.

[Amended effective January 1, 1978; April 1, 1982.]

SCR 3.340 INTRODUCTION AND ADMISSIBILITY OF EVIDENCE, EVIDENCE TAKEN IN OTHER PROCEEDINGS

The testimony at all hearings shall be in person, except that the parties may use depositions under the same standards as those prescribed by the Kentucky Rules of Civil Procedure. The rules of evidence applicable in civil actions shall apply.

Where, in any proceeding, evidence has been taken under oath upon due notice to the Respondent, and at the taking of which Respondent has appeared, either in person or by counsel, or as attorney for any party, a duly certified transcript of all, or the essential portions, of such proceedings may be used as evidence in any hearing or in any investigation antecedent to or in connection with any disciplinary case involving the same charge or any charge growing out of matters connected therewith, and such transcript and record, or parts thereof, may be made a part of the record on any hearing or investigation.

SCR 3.350 TRANSCRIPT OF EVIDENCE

The proceedings before the Trial Commissioner shall be reported by as reporter appointed by the Trial Commissioner.

[Amended effective January 1, 1978.]

SCR 3.360 TRIAL COMMISSIONER TO FILE REPORT WITH BOARD

(1) When a disciplinary proceeding has been finally submitted, the Trial Commissioner shall promptly file

with the Board within thirty (30) days after the transcript of evidence is filed by the reporter with the Director, the entire transcript of the proceeding, the transcript of testimony together with such papers as may have been filed, and a written report in the nature of findings of fact relating to guilt or innocence, which shall contain a concise statement of:

(a) the charges made against the defense offered by the respondent;

(b) the proceedings had;

(c) the facts which the Commissioner deems proved by substantial evidence.

The Trial Commissioner's report shall constitute a part of the record in the case. The report shall be advisory.

(2) The Trial Commissioner shall file his report with the Board within thirty (30) days after the transcript of evidence has been filed by the court reporter with the Director, or shall file a verified motion for an extension of time with the Chairman of the House of Delegates, with service on the parties, stating with particularity the grounds therefor. The Chairman may grant up to a sixty (60) days extension of time for the Trial Commissioner to file his report. If the Trial Commissioner fails to timely file the report or a verified motion for extension of time, the Chairman shall request the Supreme Court to issue a show cause order to the Trial Commissioner.

(3) Within forty (40) days after the filing of the report with the Director, each party shall file a brief

simultaneously with the Director and no reply briefs shall be permitted.

Upon receipt of the transcript and the Trial Commissioner's report, and the expiration of the forty (40) days briefing time, the matter shall be scheduled for consideration by the Board. Oral argument shall be had before the Board by request filed with the Director by any party no less than twenty (20) days prior to the scheduled consideration of the matter by the Board, or may be scheduled by the Board on its own motion.

[Amended effective January 1, 1978; January 1, 1987; August 28, 1989.]

SCR 3.370 BOARD'S ACTION ON TRIAL COMMISSIONER'S REPORT AND PROCEDURE IN THE COURT

(1) Upon receipt of the report of the Trial Commissioner, the Board shall promptly consider and act upon the entire record. Only the President, the President-Elect, the Vice-President and the fourteen duly elected members of the Board from their respective Supreme Court districts shall be eligible to be present, participate in, and vote on any disciplinary case. Any member who has participated in any phase of a disciplinary case submitted to the Board under this Rule, or has been challenged on grounds sufficient to disqualify a circuit judge shall be disqualified; and the Chief Justice shall appoint a member to consider and act on the case.

(2) Nine of those qualified to sit in a disciplinary matter must be present to constitute a quorum for consideration of such matters.

(3) The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. If the respondent be found guilty, the Board shall then decide, by a roll call vote, the disciplinary action. Both the findings and any disciplinary action must be agreed upon by 9 or 3/4 of members of the Board present and voting in the proceedings, whichever is less. The result of each of the two votes shall be recorded in the Board's minutes and in a written decision of the Board giving its findings of fact and conclusions of law and reasons therefor as stated in paragraph (4) to this Rule. The President shall sign and file with the Director an order setting forth the action and decision of the Board, and the Director shall mail copies of such order and decision, together with a copy of the Trial Commissioner's report, to the respondent and his counsel and to each member of the Tribunal. The Board, by a vote of a majority of the Board present and voting, may remand the case to the Trial Commissioner for clarification of the Trial Commissioner's report or for an evidentiary hearing on points specified in the order of remand. The Board may order the parties to file additional briefs on specific issues.

(4) The Board will, in its decision, state wherein it differs with the findings of fact of the Trial Commissioner, and will state the degree of discipline, if any.

(5) The entire record, together with a certified bill for costs and expenses incurred in the investigation preliminary to, and in the conduct of, the proceedings, shall be filed with the Clerk by the Director.

(6) The respondent may file a notice for the Court to review the Board's decision within thirty (30) days after

the Board's decision is filed with the Clerk stating reasons for review accompanied by a brief supporting his position on the merits of the case. The Director may file a brief within thirty (30) days thereafter in support of the Board's decision. Before the notice for review can be filed, the respondent shall furnish a bond with surety acceptable to the Clerk, conditioned that if the principal in the bond be disciplined by the Court, he will promptly pay all costs incurred in the proceeding including those certified under Rule 3.370. If he files his response in forma pauperis, no bond shall be required.

(7) If the respondent files a notice for the Court to review the Board's decision, the matter will stand submitted to the Court when the Director files a Response or the time for Response has expired. Otherwise, the matter will stand submitted upon expiration of the time limit in which one may file a notice for the Court to review.

(8) The Court may within sixty (60) days of the matter being submitted notify both the Director and respondent that it will review the Board's decision. If the Court so acts, the Director and respondent may each file briefs within forty (40) days with no right to file reply briefs unless by order of the Court whereupon the case shall stand submitted. Thereafter, the Court shall enter such orders or opinion as it deems appropriate on the entire record.

(9) If the respondent does not file a notice of review or the Court does not notify the parties of its review under paragraph (8) of this Rule, the Court shall enter an order adopting the decision of the Board relating to all matters.

(10) When the respondent is proceeded against by warning order, the notice in paragraph (3) and paragraph (8) of this Rule shall be deemed to have been served thirty (30) days after the date of the making of the warning order.

(11) In each case to be presented to the Board there shall be supplied with the Director's file a sealed envelope containing a statement of all orders of unprofessional conduct, years of membership in the association, and withdrawals from the association and reasons therefor, of the respondent. Same will be opened only if the Board votes to recommend a finding of guilty, and may be considered in deciding what discipline to recommend. Such statement will become part of the record of the case and be transmitted with the rest of the file to the Supreme Court. Prior to the submission of a case to the Board a copy of said statement will be sent to the respondent, who may review documents relative to it at the Bar Center and may comment upon and point out errors contained in the statement.

[Amended effective January 1, 1978; July 1, 1979; April 1, 1982; January 1, 1987; August 28, 1989; September 15, 1990.]

SCR 3.380 DEGREES OF DISCIPLINE

Upon findings of guilt or unprofessional conduct, discipline may be administered by way of admonition, private reprimand, public reprimand, suspension from practice, or disbarment. If a private reprimand is issued, it shall not be made public and shall be transmitted only to the respondent, or his attorney, and to the attorney for

the complainant, and the record shall be sealed, subject to reopening only on order of the Court.

[Amended effective January 1, 1978; April 1, 1982.]

SCR 3.390 NOTICE TO CLIENT OF SUSPENSION OR DISBARMENT

There shall be contained in every opinion or order imposing disbarment or a suspension of more than two (2) months a direction that such suspended or disbarred attorney notify all courts in which he has matters pending and all clients for whom he is actively involved in litigation and similar legal matters of his inability to continue to represent them, and of the necessity and urgency of promptly retaining new counsel. Such notification shall be by letter duly placed in the United States mail within ten (10) days of the date the order of suspension or disbarment becomes effective, and such suspended or disbarred attorney shall simultaneously provide a copy of all such letters to the Director of the Association.

Failure to do so shall subject the respondent to a charge of contempt of Court.

[Amended effective January 1, 1978; April 1, 1982; January 1, 1987.]